ENGLISH CONSTITUTIONAL HISTORY

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FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME

BY

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NOTE TO THE EIGHTH EDITION.

In the preparation of the eighth edition of this work I have followed, for the most part, the example set by the preceding editor in regard to the treatment of the text and notes: on the one hand, I have preserved the original text in its integrity, with only such modifications as were necessary to bring it up to date; and, on the other hand, I have incorporated various lengthy notes in the text, and have, in consequence, been obliged in several cases to transfer them to different places in the work. The main editorial additions are indicated by square brackets. The largest consecutive addition has been made at the end of the book: a new chapter (xviii) having been set up of the final section of the old chapter (xvii), together with the present editor's added matter.

Other changes may be briefly mentioned as follows: (1) Omission in the notes of a number of extracts from texts in Latin, as collections of historical documents are now much more readily accessible than they were when the work was originally written; (2) several transpositions of text; (3) a few grammatical changes, including glaring cases of the split infinitive (which annoy many readers); (4) certain verbal alterations of a different kind, *e.g.*, Magna Carta (for Magna Charta), Scottish (for Scotch), etc.; (5) references to earlier editions of many published works are now made to the latest editions, and further references to recent literature are given; (6) the text has in many instances been divided into new paragraphs, in order that study and reference may be facilitated; (7) for the same reason, the page headings and marginal notes have been changed to a great extent; (8) the table of contents has been arranged on an entirely new plan, and the index has been completely reconstructed both in form and

substance; (9) the employment of capitals has been minimised, since their frequent use not only makes the page look foreign and unpleasing to the eye, but sometimes interferes with the grasp of the meaning; (10) a clearer and less crowded type has been adopted, this being the main cause of the increase in the number of pages—from 624 to 789 (exclusive of table of contents and index). Throughout the needs of the student as well as of the general reader have been borne in mind.

One word in conclusion. Recent events have shown how necessary it is for the British citizen to possess a knowledge of the development of our Constitution. It is therefore devoutly to be wished that constitutional history may become an essential subject in the curriculum of our national, public school, and university education, and may be taken up more by the general reader. The more thoroughly we understand its underlying principles and foundations, and appreciate its growth as a living organism, the more clearly shall we see that it is a delicate entity which we must approach with respect, handle with care, and alter with hesitation.

COLEMAN PHILLIPSON.

4, HARCOURT BUILDINGS,
TEMPLE.
June 27, 1919.

AUTHOR'S PREFACE TO THE SECOND EDITION.

A SECOND edition of this work being required, I have taken the opportunity to revise it carefully throughout. While preserving the original arrangement, I have added much fresh matter, and several portions, more especially the chapter on "The Succession to the Crown," and the last chapter on the "Progress of the Constitution since the Revolution," have been to a considerable extent rewritten. The latter chapter, from a fear lest the volume should extend to an inconvenient length, had originally been too much compressed. It has now been broken up into two chapters, which will, I trust, be found to treat with adequate fulness the important topics which fall within the post-Revolutionary period.

As stated in the preface to the first edition, the aim of the present work is to give a concise but comprehensive history of the origin and development of the English Constitution. Intended primarily as a textbook for students at the Universities and Inns of Court, it was my hope that the book might also prove not unacceptable to the general reader. For all of us alike, the history of the Political Constitution under which we live must possess a practical value, apart from the interest attaching to the many stirring events which light up the story of its genesis and growth. A clear apprehension of the varying political aspect of the English nation throughout its long career is as essential to a true knowledge of English history as a familiarity with the wars and the social phenomena which mainly arrest the attention of the general historian.

The very favourable reception which this work has met with, and the short space of time within which its position

has been established, constitute a source of legitimate gratification, and I have spared no pains to make the present edition as complete as possible.

My obligations to the older writers, Kemble, Lappenberg, Palgrave, and Hallam, as well as to the more recent works of Stubbs, Freeman, and May, are apparent, and have been duly acknowledged. But numerous other writers of eminence have been referred to, and while gladly availing myself of the guidance of previous workers in the same field, I have also personally consulted the Rolls of Parliament, the Mediæval Chroniclers, and other original authorities, and have endeavoured to arrive at an independent judgment on all points of importance.

The arrangement adopted is still, in the main, chronological, but with occasional deviations when some particular topic seemed to require a continuous treatment.

I have adhered to my original plan of considering ecclesiastical matters purely under their political aspect, and of endeavouring, as far as possible, to keep aloof from all party spirit in describing the nature and growth of our institutions.

The texts of Magna Charta, the Petition of Right, and the Bill of Rights—those three great landmarks of English Constitutional History—which were given in full in the first edition, have been supplemented by the text of the Act of Settlement, which completes the written code of our Constitution.

T. P. T.-L.

The Temple, *December* 1879.

EDITOR'S PREFACE TO THE SEVENTH EDITION.

With the present impression this work has reached the seventh edition, and as the title-page sets forth that it has been revised throughout with notes, a few preliminary remarks from myself, the present editor, will be appropriate.

Four decades have almost passed since the author gave to the work, in the second edition, the last touches it was ever to receive from his hand. The third and fourth editions were committed to the able charge of the late Mr. C. E. H. Carmichael; while the task of revising the re-issue in the fifth and sixth editions was entrusted to myself. A seventh edition, demanded by the extraordinary popularity of the work and by the great and increasing interest in the subject, is now required; and the invitation of the publishers—whose courtesy throughout I gratefully acknowledge—to again undertake the labour of revising and seeing Mr. Taswell-Langmead's "Magnum Opus" through the press has given me much satisfaction.

After a brilliant career at Oxford, and on the threshold of a legal profession full of promise for a distinguished future, Mr. Taswell-Langmead was snatched away by premature death in 1882, in his forty-first year. But thus early he had ensured for himself a high and enduring place on the roll of Constitutional lawyers. His Constitutional History is his own in original conception and method. In the clearest language, allied to harmonious arrangement, its substance laboriously culled from the most unimpeachable sources, it describes the development of the English Constitution from the earliest times down to the close of the nineteenth century. Additions, from time to time,

will suffice to keep it up to date. It is a manual of the highest rank, and is, as such, recognised by all universities, English and foreign alike. It only remains for succeeding editors, striving to follow in the author's footsteps, to preserve the original matter in its integrity, with only such modifications as are from time to time necessary.

To this purpose I have endeavoured faithfully to adhere.

In the way of arrangement, some alterations have been effected which it is hoped will be welcomed by students, as it is owing to suggestions from them that they have been introduced; *e.g.*, certain long footnotes, which had outgrown reasonable dimensions, have been incorporated with the text, such as that on "Treason"; and the editor and publishers hope that the rearrangement may enhance the usefulness of the work.

I have made myself responsible for a short section at the end, briefly reviewing the latest development of the Constitution. The author's text has been only very occasionally touched and enlarged.

From the "History of the English Constitution" by Professor von Gneist, much valuable matter has been incorporated into the footnotes; and to the work of the brilliant American writer in the same field of research, Mr. Hannis Taylor, to that of Mr. L. O. Pike on the Constitution of the House of Lords, as also to the recent works of Professor A. V. Dicey, Sir William Anson, Prof. F. W. Maitland (ed. Fisher), Dr. Edward Jenks, and Mr. E. W. Ridges, I am obliged for many references and extracts. Other such have been acknowledged, each in place, without its being possible to enumerate here all the authors to whom I am under an obligation.

PHILIP A. ASHWORTH.

OXFORD, *September* 1911.

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ENGLISH CONSTITUTIONAL HISTORY.

CHAPTER I.

ANGLO-SAXON PERIOD.

Origin of the English.

The first step in a history of the institutions of the English people is to determine the elements of the English nationality. It is not unusual to speak of the English as a mixed race formed out of the fusion of the Britons, the Anglo-Saxons, the Danes, and the Normans; but this form of expression is apt to convey an erroneous idea of the facts. No modern European nation is, indeed, of pure unmingled race; yet in all some one element has maintained a clear and decided predominance. In the English people this predominant element is the Germanic or Teutonic. The Teutonic conquest of Britain was something more than a mere conquest of the country; it was in all senses a national occupation, a sustained immigration of a new race, whose numbers, during a hundred and fifty years, were continually being augmented by fresh arrivals from the fatherland (*a*).

Teutonic conquest of Britain, A.D. 450—600.

Before the end of the sixth century, the Teutonic invaders had established a dominion in Britain, extending from the German Ocean to the Severn and from the English Channel to the Firth of Forth. The Britons were soon driven into the western parts of the island, where they maintained themselves for a time in several small states (*b*).

(*a*) [*Cf.* Tacitus, Agricola, c. 28.—Ed.]

(*b*) [*Cf.* Lappenberg, Geschichte von England (1834), i. 122; Gneist, Hist. of the English Constitution (1891), pp. 2 *seq.*; and Hannis Taylor, The Origin and Growth of the Engl. Constitution (1900), for the "Teutonic theory."—Ed.]

The remnant of the country which they retained was indeed at first of considerable extent, including not only modern Wales but the great kingdom of Strathclyde, stretching from Dumbarton to Chester, together with Cornwall, Devon, and part of Somerset. But the eastern boundary of this territory yielded more and more to the influence of the invaders; and it was only in the mountains of Wales and Cumbria that the Britons preserved for any length of time their ever-decreasing independence. During the long-continued and peculiarly ferocious series of contests between the natives and invaders, vast numbers of the flower of the British race perished. Many Britons sought refuge in emigration to the continent. Not a few of the less warlike doubtless remained as slaves to the conquerors, and a still greater infusion of the Celtic element may have been effected by the intermarriages of the victors with the women of the vanquished (*c*). But the Germanic element has always constituted the main stream of our race, absorbing in its course and assimilating each of the other elements. It is "the paternal element in our system natural and political" (*d*). Since the first immigration, each infusion of new blood has but served to add intensity to the national Teutonic element. The Danes were very closely allied in race, language, and institutions to the people whom they invaded: and the Normans, though speaking a different language, and

No general commixture of races;

(*c*) This hypothesis is strengthened by the fact that the few words in our language which have been retained from the original Celtic (about thirty-two in number, excluding proper names) have all relation to inferior employments, and for the most part apply exclusively to articles of feminine use or to the domestic occupations of women. (See a list of these words, made by Garnett, in Transactions of the Philological Society, vol. i. p. 171.) On the other hand, the tribal or family organisation of the Germans and the peculiar honour given to women among them, point to the strong improbability of any general amalgamation through intermarriage. The Britons also were long averse to such an admixture. See Stubbs, Const. Hist., i. 62.

(*d*) Stubbs, Select Charters, Introductory Sketch, p. 3. See also Archdeacon Squire, Anglo-Saxon Government in Germany and England (1745); Freeman, Norm. Conq., vol. i.; and Stubbs, Const. Hist., vol. i. The arguments in favour of the opposite theory, of the permanence of the British race, are very ably stated by L. O. Pike in his Origin of the English. Coote, Romans of Britain (1878), also maintains the permanence of the population of Britain, but then he affirms that the greater part of the island was occupied by a Belgic race, who began to settle here before the invasion of Julius Cæsar, and that these Belgians were Teutonic.

possessing different political and social institutions, were yet descended from a branch of the same ethnic stock.

But whatever be the proportion in which the various national elements have coalesced, it is certain that the principles of our constitution are in no wise derived from either Celt or Roman. The civilisation of the Romans, for the most part, departed with them (*e*). The Roman law disappeared for a time from the judicial system of our country. After the conversion of the English to Christianity, however, it must indirectly have exercised considerable influence on Anglo-Saxon jurisprudence, through the medium of the dignified ecclesiastics who in Witenagemot and Shiremot took so large a part in the making of laws and the administration of justice (*f*). Directly, also, it was re-introduced from the continent, in the twelfth century, as a consequence of the revived study of jurisprudence which had there taken place. In the year 1149, Vacarius, a distinguished Lombard jurist, who had been invited to England by Archbishop Theobald, established a school of civil law at Oxford, and publicly taught the Roman jurisprudence to a numerous and eager band of students, for whose use he wrote his *Summa*, consisting of annotated extracts from the Digest and the Code (*g*). Although Vacarius was soon silenced by King Stephen, the impulse which he had given to the study of Roman law was not arrested (*h*). The so-called *Leges*

or of institutions.

Roman law

(*e*) Coote, Romans of Britain, has ably urged all that can be said for a more complete survival of the Roman civilisation, "sheltered in the ark of the cities."

(*f*) *Cf.* Thierry, Tableau de l'Empire Romain, p. 359. [In the same sense, writes Maitland, The Constitutional History of England, ed. H. A. L. Fisher, (Camb. 1909), p. 5: "Roman jurisprudence did not survive in Britain, but the traditions of Roman civilisation were of great importance. The main force which made for the improvement of law was the Church, and the Church, if it was Catholic, was also Roman. Thus, for example, at quite an early time we find the Anglo-Saxons making wills. This practice, we may safely say, is due to the Church; the Church is the great recipient of testamentary gifts." On the other hand, Lappenberg, i. 163, and Gneist, Hist. Engl. Const. p. 9, note, are of a different opinion, the latter, *loc. cit.* stating that "the influence exercised by the Roman Ecclesiastical Law was small."—Ed.]

(*g*) Gervas. Dorob. (Decem. Scrip., col. 1665). Robertus de Monte is the authority for the date, 1149, and for his compilation of nine books from the Code and Digest.

(*h*) Joh. Sarisb., Polycraticus, lib. viii. c. 22.

Henrici Primi (written probably in the early part of Henry II.'s reign) contain many extracts from the Theodosian Code or the *Breviarium;* and the legal treatises of both Glanvill and Bracton, the latter especially, are strongly marked by a large infusion of Roman principles and terminology (*i*). As a system, however, the Roman law was soon rejected in England; but some of its forms, and many of its principles, were absorbed into and amalgamated with the system which our own courts of justice had been gradually developing for themselves out of the primitive national usages. Our language, and the main outlines of our political and judicial institutions, are all inherited from our Teutonic ancestors; each has undergone a spontaneous development during the course of centuries, each has assimilated new elements; but the national identity of race, language, and institutions has never ceased to exist (*k*).

Germanic origin of English institutions.

The germs of our present constitution and laws must, therefore, be sought in the primeval institutions of the first Teutonic immigrants. Of these institutions we have little positive knowledge. According to Bede (*l*), the original immigrants consisted of the three kindred tribes of Angles, Saxons, and Jutes (*m*). Of these Tacitus does not even mention the Saxons or Jutes, and only names the Angles as one of a number of North German tribes,

(*i*) *Cf.* Bracton "the entire form and a third of the contents were directly borrowed from the Corpus Juris." (Sir H. S. Maine, Anc. Law, ed. Sir F. Pollock, London, 1906, p. 87.) Bracton was largely indebted to Azo's *Summa* on the Code and Institutes of Justinian (Savigny, Geschichte des Römischen Rechts, iv. 538 *seq.*). Twiss, in the Introductions to the several volumes of his new edition of Bracton, has thrown fresh light on the dates and incidents of the legist's career. [For a more detailed account of the law books of the Norman period *vide* Pollock and Maitland, History of English Law, 2nd. ed., vol. i., pp. 97-110; Stubbs, Lectures on Early English History, 37-133, and Maitland, Select Passages from Bracton and Azo, 1895. —Ed.]

(*k*) *Cf.* Stubbs, Const. Hist., i. 6.

(*l*) Bede (b. 672, d. 735) records very few circumstances relative to the English conquest of Britain from his own sources, but for the most part transcribes the *De Excidis Britanniae*, composed about 560, of Gildas, *b.* 516.

(*m*) [On this point *cf.* Zeuss, Die Deutschen und die Nachbarstämme, p. 54 *seq.*; and H. Taylor, The Origin and Growth of the English Constitution, chap. ii. For "the older family constitution," *see* R. Schmid, in Hermes, vol. 32 (1829).—Ed.]

without fixing their locality. In the second century Ptolemy identifies the seats of the Saxons and Angles as the district between the Elbe, the Eyder, and the Warnow, now constituting the modern Duchies of Holstein, Lauenburg, and Mecklenburg. Before the age of Bede the name of Saxon had been extended from the designation of a single insignificant tribe to that of a wide confederacy of North German tribes. Retaining their independence of Rome, tenacious of their heathen worship and their primitive barbarism, they habitually plundered the richer nations who had succumbed to the Roman sway.

Scarcely, if at all, affected by contact with Roman influences, the Teutonic tribes who invaded Britain had probably a less distinctly marked political organisation than that of their kindred on the banks of the Rhone and the Danube, a picture of whose institutions has been handed down to us in the pages of Cæsar and Tacitus. But after making due allowance for this difference, for the indistinctness of the picture itself, and for the contradictory ways in which it has been interpreted, we may yet gather from this source some general knowledge of the primeval institutions of our Teutonic forefathers.

Ancient German polity.

In the time of Tacitus, Germany appears to have been divided among a number of independent tribes, who had ceased to be nomadic and occupied fixed seats in settled communities.

The whole land of the settlement belonged to the community (the *mark* (*n*), or *vicus*), who annually allotted

[(*n*) Designated by Tacit. c. xxvi. *ager*, as opposed to *arva*. On the mark system in its social, judicial, and political aspects, see Kemble, Saxons in England; G. L. von Maurer, Gesch. der Marken-Verfassung, &c. Schmid, Gesetze der Angel-Sachsen; Nasse, Agricultural Community of the Middle Ages (trans. by Ouvry); Stubbs, Const. Hist., vol. i.; Maine, Village Communities, Lects. i. and iii. [*Cf.* also, Garsonnet, Hist. des Locations Perpétuelles, 1879, Germ. Mark, pp. 40 *seq.*; do. Merovingian and Carlovingian, pp. 469 *seq.*; Seebohm, Village Community in England, 1883; Hearn, The Aryan Household, 1879; Waitz, Deutsche Verfassungsgeschichte (Kiel, 1880); Lappenberg-Pauli, Geschichte von England, and Sohm, Fränk. Reichs- und Gerichts-Verfassung; H. Taylor, Eng. Const., pp. 7, 8, and Gneist, Hist. Eng. Const., p. 2. "Mark" is the old German word for "boundary," and hence comes to mean boundary land, and, further, "any area of land having defined boundaries." See Thudicum, Die Gau- und Marken-Verfassung in Deutschland (Erlangen, 1856).—Ed.]

the arable land among the freemen, while the pasture land was both held and used in common.

An aggregate of communities (*vici*) of the same tribe constituted the *pagus* (the *gau*); and an aggregate of *pagi* made up the *civitas*, or *populus*.

In their political life the monarchic, aristocratic, and democratic elements were clearly marked; but the ultimate sovereignty seems to have resided in a free and armed people (*o*). Some of the tribes had kings selected from particular families; others had not. But the king had only a limited power (*p*), and was rather the representative of the unity of the tribe than its ruler.

In the *vici* and *pagi* justice was administered by *principes* elected by the nation in the popular assembly, and assisted in each district by a hundred companions or assessors (*q*).

They had also *duces*, their leaders in war, elected probably from among the *principes*, but whose authority was based, not like that of the kings, on noble birth, but on personal valour (*r*). Each district contributed its hundred fighting men to the national host.

The *principes* were attended by bands of retainers (*comites*), who protected the person of their lord in war and upheld his state in peace (*s*), receiving in return such presents as their leader could confer.

The power of all the chiefs, whether *reges*, *duces*, or *principes*, was greatly limited. All important state affairs were discussed and determined in the national assemblies, held at stated times, and attended by all the freemen of the tribe. Questions of minor importance were settled by the *principes*, meeting as a separate body, and this body also appears to have taken the initiative in bringing matters before the large assembly.

Below the freemen was a class of men intermediate between the slaves and the freemen. They were not slaves, but they had no political rights. They were the cultivators of the soil which they held under the freemen, to whom they rendered a part of its produce as rent. Last of all

(*o*) Tac. Germ., c. xi.
(*p*) Tac. Germ., c. vii.
(*q*) *Id.* c. xii.
(*r*) *Id.* c. vii.
(*s*) *Id.* c. xiii.

came the mere slaves, chiefly made up of prisoners of war and of freemen who had been degraded for some crime.

Among the freemen there were differences of rank and social status: some were of noble blood and some were not; but this distinction carried with it no inequality of political rights. Military valour was shared by the German with all the northern nations; but one of their national traits was remarkable from the earliest times—the respect paid by them to the women of their race (*t*), who on their side were celebrated for an exceptional chastity. The tie of kindred was strong and all-pervading; it formed the basis of social organisation, and entered into the military, the legal, and the territorial arrangements (*u*). Side by side with it may be discerned the germ of feudalism in the relation existing between the *princeps* and his *comites*, though it was as yet unconnected with the tenure of land.

Such were the general features of the political and social system which our Teutonic forefathers brought with them to their new island home. But the process of migration and conquest necessarily produced certain modifications and developments of the primitive institutions. One of the earliest of these developments was the institution of royalty.

The Teutonic leaders assume the regal title.

According to the Saxon Chronicle, the chieftains of the first settlers were only distinguished by the title of *caldorman*, or *herctoga*, the former word expressing the civil, the latter the military, aspect of the same office (*w*). But the successful leader soon won for himself a position much stronger than that of any chief in the old land, and, in most cases, assumed the regal title, as more accurately denoting his altered relation to his followers. The word cyning, or king (*x*), connected with cyn, or kin, marked out the bearer of the title as the representative of the

(*t*) [On the position of women in early Teutonic settlements *cf.* G. Waitz, Deutsche Verfassungsgeschichte (Kiel, 1880), vol. i. pp. 48, 67-69.—Ed.]

(*u*) See Tacitus, *op. cit.*, for the importance of the family tie; its bearings on the host, c. 7; feuds, c. 21; inheritance, c. 20; the kin of the unfaithful wife, c. 19; exogamy unusual, c. 4.

(*w*) *Cf.* Freeman, Norm. Conq., i. 77.

(*x*) [*King*, possibly old German "*Chuning*," "*Kunig*," = "race," but *cf.* Germ. "kur" (as in Kurfürst) = *choice*; *election*. Gneist, Eng. Const.,

race, the head and leader of the people, not the lord of the soil. His reputed descent from Woden, the god from whom all the English kings professed to descend, invested with a semi-sacred character the authority which his own prowess and the will of the people had conferred upon him.

Conversion of the English to Christianity (597-681).

The conversion of the English to Christianity exercised an important influence upon the national development. The church not only introduced a higher civilisation, mitigated the original fierceness of the heathen conquerors, softened their pride of birth and race, and exalted the power of the intellect above that of brute force, but also supplied a new and powerful bond of union to a divided people. Once within the pale of the universal Christian church, the English, moreover, were necessarily brought into relations with the general political society of Europe: and in the highly organised system of ecclesiastical synods they found a pattern by which to regulate the procedure of their own political assemblies. From the first the church entered into the closest alliance with the state, and while paying respectful deference to the Roman See, grew up with a distinctly marked national character. Theodore of Tarsus, enthroned Archbishop of Canterbury in 668, reduced the whole ecclesiastical organisation of the various kingdoms into one national church (*y*). Henceforward the church existed as a united, central, and national institution, in spite of the separation and frequent hostility of the states to which the clergy individually belonged. Thus the ecclesiastical unity preceded and pointed the way to the civil unity of the nation. After the first missionary prelates had passed away, the highest spiritual dignities were filled by Englishmen, members, for the most part, of noble and powerful families. The tie thus created between the clergy and the state was strengthened by the union of secular and spiritual functions. The bishops were prominent members of the Witenagemot, and frequently acted as the chief ministers of the king. They also shared with the ealdormen in the local judicial administration.

National character of the church.

cap. 2, p. 14, note, remarks that the etymology of "king" is dubious. *Cf.* also Lappenberg, i. pp. 566 *seq.*; and H. Taylor, Eng. Const., p. 109.—Ed.]

(*y*) Bede, Hist. Ecc., iv. 2; Kemble, Saxons in England, ii. 364.

The church thus entered into close combination with the civil organisation, gradually intertwining itself with all the feelings and customs of the people, and acquiring in the process its exceptionally national character.

The Bretwaldas.

During the whole period commonly called the Heptarchy (*c*), the land was full of petty kings or princes, some one of whom, from time to time, obtained a forcible predominance over his neighbours. Bede enumerates seven who are said to have enjoyed such a predominance or leadership over nearly the whole island: and the Saxon Chronicle speaks of Egbert as "the eighth king who was Bretwalda" (*a*). What were the exact nature and extent of the dominion of these Bretwaldas is very doubtful: but we may accept as a fact that each of the seven had acquired and exercised some kind of supremacy over all his neighbours. The existence of the Bretwaldas would seem to indicate certain earlier attempts at a union of the whole English race, which was ultimately carried out by the West Saxon kings in the ninth and tenth centuries (*b*).

The three kingdoms of Wessex, Mercia, and Northumbria at length became predominant. Egbert, King of the West Saxons, not only added to his dominions the dependent kingdoms of Kent and Essex, but compelled the extensive States of Mercia and Northumbria to acknowledge his supremacy. Still the Mercians, East Anglians, and Northumbrians retained each their ancient line of kings,

(*c*) There were at least nine, if not ten, independent states founded by the invaders: and there was never a confederate government composed of the different states as members. The word Heptarchy, therefore, is not accurate, but it is convenient if taken to note the greater prominence of seven states out of the number.

(*a*) Bede, Hist. Eccles., ii. 5; Chron. Ang.-Sax., ann. 827. Kemble points out that of six manuscripts in which the passage quoted occurs, only one reads "*Bret*walda," four have *Bryten-walda*, and one *Breten-anweald*. "The true meaning of this word, which is compounded of *wealda*, a ruler, and the adjective *bryten*, is totally unconnected with Bret or Bretwealh, the name of the British aborigines . . . *Bryten* is derived from *breotan*, to distribute . . . disperse: it is a common prefix to words denoting wide or general dispersion, and when coupled with *wealda* means no more than an extensive, powerful king—a king whose power is widely extended."—Saxons in England, i. 20. [*Cf.* Lappenberg, i. p. 203; Gneist, Const. Hist., p. 35, and note.—Ed.]

(*b*) Freeman, Norm. Conq., i. 28.

and neither Egbert nor his five immediate successors assumed any other title than that of King of the West Saxons. This is the only style used by Alfred in his will.

Invasions of the Danes, 787-1070.

The consolidation of the various kingdoms into one was hastened by the invasions of the Danes, by which the three minor kingdoms of Mercia, Northumbria, and East Anglia were overwhelmed, and even that of the West Saxons was brought to the brink of destruction. Led by their famous sea-kings, these "slayers of the north" ravaged almost every European coast during the ninth and tenth centuries. They were closely akin to the English, and spoke another dialect of the same common Teutonic speech. Their institutions exhibited a striking similarity to those of the English, and even where differing in detail were generally governed by identical principles. The first recorded descent of the Danes upon the shores of England occurred toward the end of the eighth century. They reappeared again and again, and at length, instead of making mere predatory excursions, began to form permanent settlements in the island. The genius and heroism of Alfred alone rescued the English from their imminent peril. Yet he was never able to expel the Danes from England, or to become its sole master. By the treaty of Alfred and Guthrum (A.D. 879), the limits of the Danish occupation southward were defined "up on the Thames, and then up on the Lea, along the Lea unto its source, then right to Bedford, then up on the Ouse unto Watling Street" (*c*). To the north it extended as far as the Tyne, and on the West to the mountain districts of Yorkshire, Westmoreland, and Cumberland. Throughout this district—the *Denalagu*, or region where the Danish law was in force—the *armies*, as the Saxon Chronicle expressly terms them, of the Danes continued to occupy the land, governing, as a military aristocracy, the subject Anglian population. The victorious arms of Alfred's three able and energetic successors, Edward, Athelstan, and Edmund, succeeded in reducing the Danes to something like real submission, and also in obtaining an acknowledgment of

(*c*) Thorpe, Anc. Laws and Inst., ann. 879.

supremacy over the bordering nations of the isle of Britain. At length, in 959, Edgar, having outlived the last Danish King of Northumbria, received the crown as king of all England, uniting in his person, as the elect of all three provinces of England, the threefold sovereignty of the West Saxons, Mercians, and Northumbrians (*d*). The English and the Anglo-Danes gradually coalesced, the English language and institutions maintaining the ascendancy, though appreciably influenced by contact with the foreign element in their midst.

After the death of Edgar the Peaceable (viz., in 975), the minority and feeble character of Ethelred the Unready provoked fresh attacks from Denmark. These now assumed the form of a regular war of conquest, conducted by the kings of a country which had at length been admitted within the civilising pale of Christendom, and whose people were no longer ferocious pirates, like their ancestors in the former invasions. The English royal house was for a time supplanted by its Danish rival, but the polity of the kingdom was not changed. The English still outnumbered their conquerors; and on the death of Harthaknut, in 1042, the ancient line of Cerdic (*e*) regained the throne. With the exception of the reigns of Harold II. and the first four Norman kings, descendants of the house of Cerdic have occupied it ever since.

Before the Norman conquest, the various Teutonic tribes had coalesced with one another and with the descendants of the Danish settlers, and had become fused into one nation. We have now to enquire what was the constitution of the English nation from the seventh to the eleventh century; a constitution which survived the Norman conquest, and which in all its essential principles developed and adapted from time to time to meet the requirements of successive generations, but still the same has continued down to our own day.

Constitution of English nation from 7th to 11th century.

Of the exact process by which the territory conquered by each of the invading tribes was divided amongst the

Appropriation of the soil.

(*d*) E. W. Robertson, Hist. Essays, p. 203; Stubbs, Const. Hist., i. 191.

(*e*) [H. Taylor, Engl. Const., vol. i. p. 176, remarks, "As the fittest it survived."—Ed.]

colonists, we have no positive knowledge (*f*). Any statement on this point must therefore necessarily be hypothetical. But there can be little doubt that, as to a large portion of the land of each colony, a principle of allotment was generally adopted based upon the existing divisions of the host into companies, each consisting of a hundred warriors united by the tie of kinship. The allotment of land made to each hundred warriors would be sub-divided, according to the minor divisions of the kindred, into *mægths*, *i.e.*, a greater or less number of settlers closely connected by the family tie (*g*). Certain portions of the land appropriated to the separate *mægths* were held in absolute ownership by the heads of families; other portions were both held and cultivated in common as the common property of the community.

General allotment probable.

The *mægth*.

Besides the land thus divided among the simple freemen, a further portion of the territory was retained by the chief of the tribe as his private estate; and it is probable that the nobles also and leaders of subordinate rank either themselves appropriated, or received, grants of estates in severalty.

Private estates of the chiefs.

All the land which remained after satisfying these various claimants was the common property of the whole colony—the folkland. As the various tribal colonies or shires coalesced into kingdoms, and the kingdom of Wessex absorbed the other kingdoms, and developed into the kingdom of England, the folkland of the shire became in turn the folkland of the provincial kingdom and of the English nation.

Public lands.

Although tenure of land in common by local communities continued to subsist, and has left its traces in the common

Absolute ownership in severalty.

(*f*) [See H. Taylor, Engl. Const., i. p. 134: "The 'English kin' brought with them, and replanted at some stage of its development, the primitive system of landownership represented in the Fatherland by the village community of kindred cultivators called in the German muniments the 'mark,' which developed in Britain into the 'kin' or township."—Ed.]

(*g*) "There were two groups of individuals in the Anglo-Saxon community to which the word 'family' may be applied. . . . The first and larger group, including the whole body of the kindred, is called in Anglo-Saxon the *Mægth* or *Mægburh*. . . . The second and smaller group, including only the husband, his wife, and children, may be called the household."—Young, Essays in Anglo-Saxon Law (Boston, 1876). On the *Mægburh*, see further, Kemble, Saxons in England, i. 234.

lands of townships and manors of the present day, absolute ownership in severalty, which had existed from the first, soon became the general rule.

During the pre-Norman period, therefore, the whole land of England may be broadly divided under the two great heads of (1) public, or *folcland:* and (2) private or *bocland.*

(1) *Folcland* (*h*), the land of the folk or people, was the common property of the nation. It formed the main source of the state revenues, and could not be alienated without the consent of the national council. But it might be held by individuals, subject to such rents and services as the state, in its landowning capacity, should think fit to determine. While, however, it continued to be folkland, its alienation was only temporary, and could not be in perpetuity; so that at the expiration of the term for which it had been granted it reverted to the nation. It was closely analogous to the *ager publicus* of the Romans, and its individual holders to the Roman *possessores.* Folkland.

(2) *Bocland* (*i*) was land held in full ownership, either as part of an original allotment, or as having been subsequently severed from the folkland, with the consent of the nation, and appropriated to individuals in perpetuity, subject merely to such burdens as the state, in its political as distinguished from its landowning capacity, might impose upon its members. Bookland.

Folkland, even when granted to individuals for a life or lives or other term in severalty, always retained certain marks of its public character in the burdens to which it

(*h*) [H. A. L. Fisher, editor of Maitland, Const. Hist., adds, in a note to p. 57 : "The term *Folkland* is now regarded, not as denoting public land," but as "land held without written title under customary law." *Cf.* Pollock and Maitland, History of English Law, vol. i. p. 62. The point was proved by Vinogradoff in 1893; Engl. Hist. Rev., viii. 1-17. "This does not imply that there was no unappropriated land, only that it was not called *folkland.*"—Ed.]

(*i*) [*Bocland* = land conveyed by book or charter, the usual mode after the introduction of writing. Though all land, on being granted in perpetuity, ceased to be *Folcland*, it was not strictly *Bocland*, unless conveyed in writing. Land thus held in absolute property has been called in different Teutonic dialects, *edel, odal, or alod.* "Odal" or "pedel" is an ancient Norse word denoting landed property to which no other person may lay claim, as distinguished from "Fe-odal"="property lent" : *cf.* the Odal-bonden (peasants) in Sweden.—Ed.]

was liable. Its possessors were bound to assist in the execution of various public works, including the repair of royal vills; and they might be called upon to entertain the king and great men in their progress through the country, and to furnish carriages and horses for their service. Bookland, on the contrary, was released from all public burdens, except the *trinoda necessitas*, or liability of its owners to military service and to a contribution for the repair of fortresses and bridges (*fyrd*, *burh-bot*, and *brycge-bot*).

Bookland might be held for various estates or interests. It was generally alienable *inter vivos*, devisable by will, and transmissible by inheritance. It might be entailed or limited in descent, in which case the owner was deprived of the power of alienation. The king, like any of his subjects, had private estates of bookland which did not merge in the crown, and over which he exercised the same powers of disposition as a private individual (*k*). In the course of time much of the folkland was converted into bookland. Large grants were made to the church, and also to individuals for specific purposes, as for the pay of the king's thegns (thegn-land), of the gerefa (gerefa-land, reve-land), or of the officers of the royal household.

Both folkland and bookland might be leased out to free cultivators, in such quantities and on such terms as the holders pleased. When so leased out, it was termed *lænland* (land lent or leased).

As the regal office advanced in dignity and power, a tendency set in to substitute the king for the nation as the

(*k*) From the will of King Alfred (Cod. Diplom., ii. 112) it is evident that both he and his grandfather Egbert had the absolute disposal of their bocland. Allen (Royal Prerogative, p. 144) thus sums up the information on the land laws of the Anglo-Saxons contained in this interesting document: "It appears that Egbert, grandfather of Albert, had settled his landed property on his male in preference in his female heirs; that Ethelwulf, father of Alfred, had bequeathed various estates to his younger children, and regulated, in certain contingencies, how they should descend; that Alfred himself and two of his brothers had acquired landed property, in addition to the inheritance they received from their father; that their rights over their estates were settled and adjudged in the courts of law as if they had been private individuals; and lastly, that Alfred was empowered to make a new settlement of his lands by a decision of the witan in these words: 'It is now all thine own; bequeath it, give it, or sell it to kinsman or stranger, as it pleaseth thee best.'"

owner of the national lands; the word folkland gradually fell out of use, and was replaced by the term *terra regis*, or crown-land. This tendency reached its climax after the Norman conquest, when the whole land of the kingdom came to be regarded as the demesne land of the king, held of him by a feudal tenure (*l*).

The folkland becomes *terra regis*.

The unit of the territorial division was the *tun*, township or *vicus*, occupied by a body of allodial owners associated by the tie of local contiguity, and also as representing either the original *magth* community of allottees, or the dependent settlers on the estate of the immigrant chief. Each township had its *tun-gemot*, or assembly of freemen, and a *tun-gerefa* as its head man or chief executive officer (*m*). The townships were grouped together into *hundreds*, or as they were called in the Anglian districts, *wapentakes*. An aggregation of hundreds constituted the *shire*, and the union of shires made up the later kingdom.

Territorial divisions.

The township.

The hundred, or wapentake, a district answering to the *pagus* of Tacitus, probably has its origin in the primitive settlements, varying in geographical extent, of each hundred warriors of the invading host. The term wapentake, which clearly has reference to the armed gathering of the freemen, points to the military origin of the hundred, like that of the *harred* in the Scandinavian kingdoms (*n*). In England the names hundred and wapen-

The hundred.

(*l*) For a fuller description of folkland and bookland, see Allen, Royal Prerog. pp. 135 *et seq.*

(*m*) "The *tun* is originally the enclosure or hedge, whether of the single farm or of the enclosed village, as the *burh* is the fortified house of the powerful man. The corresponding word in the Norse is *gardr*, our *garth* or *yard*. The equivalent German termination is *heim*, our *ham*; the Danish form is *by* (Norse *bú*=German *bau*)."—Stubbs, Const. Hist., i. 88. (*Cf.* also the Flemish and Frisic *hem* and *um*.)

(*n*) The difficulty in determining the principle upon which the hundreds were established is increased by the fact that they are most numerous in some of the smaller shires. Kent contains 61, Sussex 65, Dorsetshire 31 hundreds; while Lancashire has only six. A probable explanation of this disproportion, and a further argument in favour of a military origin, may be derived from the fact that the smaller southern counties were the districts first conquered, and therefore the most densely populated by the new settlers. The county of Kent is divided into six *lathes*, of nearly equal size, having the jurisdiction of the hundreds in other shires. The lathe may be derived from the Jutish "*lething*" (in modern Danish "*leding*"—a military levy). The singular division of Sussex into six "rapes" (each of which is subdivided into hundreds) seems also to have been made for military purposes.

take first appear in the laws of Edgar (A.D. 959-975) in connection with the police organisation of the kingdom. By this time the term hundred, originally denoting certain personal relations of the inhabitants of a district, had probably acquired its territorial signification as a subdivision of the shire or kingdom to which it belonged. It had its *hundred-gemot*, which took cognisance of all matters, criminal and civil, arising within the hundred, and was attended by the thegns of the hundred and by the representative townreve and four men from each township. The chief executive officer was the *hundred-man* or *hundreds-ealdor*, who convened the *hundred-gemot*. He was generally, and at first always, elective; but as the personal gradually gave way to the territorial influence, he was in many places nominated by the thegn or other great man to whom the hundred belonged.

The shire.

The division into shires (a word originally signifying merely a subdivision or share of any larger whole) is very ancient, but the period at which it arose is uncertain. We have evidence that in Wessex the division into shires existed as early as the end of the seventh century, long anterior to the time of Alfred, to whom their institution has been popularly attributed. In the laws of Ina [Ine 36, sec. 8], king of the West Saxons (*cir.* A.D. 690), provision is made for the case of a plaintiff failing to obtain justice from his *scirman*, or other judge: if an ealdorman compound a felony it is declared that he shall forfeit his *scir:* and the defendant is forbidden secretly to withdraw from his lord into another *scir*. As Wessex gradually annexed the other kingdoms, these naturally fell into the rank of shires; or where they themselves had arisen from the union or several early settlements, were split up into several shires on the line of the old tribal divisions (*o*).

The old Norse "*hreppr*" denoted a nearly similar territorial division. (See Lappenberg, England under the Anglo-Saxons, by Thorpe, i. 96, 107.) Two counties, Yorkshire and Lincolnshire, were divided into Trithings or Thirds (which still subsist in Yorkshire under the corrupted name of Ridings), and these were subdivided generally into wapentakes.—[*Cf.* Gneist, Hist. Eng. Const., p. 41, and footnote; Leg. Edward, c. 33. See also Lappenberg, Geschichte von England (1834), i. p. 91.—ED.]

(*o*) On the various origins of the different historical shires or counties, see Palgrave, Commonwealth, p. 116; and Stubbs, Const. Hist., i. 124, 125, who

The government of the shire was administered concurrently by an ealdorman, and the *scir-gerefa*, or sheriff. The ealdorman (the *princeps* of Tacitus and the *comes* of the Normans) was originally elected in the general assembly of the nation: but there was a constant and increasing tendency to make the office hereditary in certain great families. On the annexation of an under-kingdom, the ealdormanship usually became hereditary in the old royal house; but in all cases, down to the Norman conquest, the consent of the king and witan was required at each devolution of the office. Sometimes several shires were administered by one ealdorman, but this arrangement did not involve an amalgamation of the separate organisations of each shire. The sheriff (or as he was termed after the Norman conquest, *vice-comes* –a title apt to obscure his independence of the ealdorman) was the special representative of the regal or central authority, and as such was usually nominated by the King (*p*). He was judicial president of the *scir-gemot*, or shiremoot, executor of the law, and steward of the royal demesne (*q*). At first the sheriff seems to have exercised coordinate authority with the ealdorman, but gradually the civil administration became almost entirely concentrated in the former, leaving

The ealdorman.

The sheriff.

says: "The constitutional machinery of the shire represents either the national organisation of the several divisions created by West Saxon Conquest; or that of the early settlements which united in the Mercian Kingdom, as it advanced westward; or the rearrangement by the West Saxon dynasty of the whole of England on the principles already at work in its own shires." [H. Adams, Essays in Anglo-Saxon Law, p. 19, arrives at the same conclusion: "The state of the seventh century became the shire of the tenth, while the shire of the seventh century became the hundred of the tenth."—Ed.]

(*p*) "It is probable, on early analogy, that the gerefa was chosen in the folkmoot; but there is no proof that within historical times this was the case, although the constitutionalists of the thirteenth century attempted to assert it as a right, and it was for a few years conceded by the Crown." —Stubbs, Const. Hist., i. 126.

(*q*) [The sheriff was often styled *Præpositus*, *præfectus*, *judex*—these being merely Latinised forms of the word gerêfa. "The opinion formerly current in England that the Shirgerêfa was originally an elected popular officer has no other foundation than the passage (Leges Edwardi Conf. de Heretochiis, c. 32 a), "sicut et vicecomites provinciarum et comitatum eligi debent." Anglo-Saxon accounts taken from statutes, documents, and historians all indicate a free appointment and deposition of the Shirgerêfa at the will of the King."—Gneist, Stubbs, Hist., p. 54, note 3.—Ed.]

to the latter, as his principal function, the command of the military force of the shire. Unlike the office of ealdorman, the sheriffdom, as a rule, never became hereditary. This circumstance was productive of important constitutional effects after the Norman conquest, as the kings found ready to hand a machinery which enabled them effectually to assert the central authority in every shire, and thus to check the growth of local feudal jurisdictions.

The burgh.

The *burh*, or town, was in its origin "simply a more strictly organised form of the township. It was probably in a more defensible position; had a ditch or mound instead of the quickset hedge or 'tun' from which the township took its name; and as the 'tun' was originally the fenced homestead of the cultivator, the 'burh' was the fortified house and court-yard of the mighty man - the king, the magistrate, or the noble" (*r*).

Other *burhs* were gradually developed out of the village township, or were founded on the folkland. In these the municipal authority was similar to that of the free township. The chief magistrate was the *gerefa*, in mercantile places the *port-gerefa*, in others the *wic-* or *tun-gerefa*, who presided in the *burh-gemot*, or meeting of all the freeholders of the *burh*. In the larger towns, which were made up of a cluster of townships or lordships, the organisation more nearly resembled that of the hundred than that of the simple township.

The guilds.

Side by side with the town constitution, and to a certain extent influencing its development, was the organisation of the municipal guilds. The ancient municipal guilds (so called from *gildan*, to pay or contribute) were voluntary associations for ecclesiastical or secular purposes, analogous to our modern clubs. By some the guilds have been regarded as an inheritance from the Roman municipal constitution; but an uninterrupted Roman descent can nowhere, in England, be traced. The similarity to be found in the oldest municipal denominations and institutions on both sides of the German Ocean points rather to a common origin in the ancient heathen sacrificial

(*r*) Stubbs, Const. Hist., i. 99.

guilds, in which the common banquet, "the cradle of many a political institution," formed a leading feature (*s*). The suppression of these devil's guilds (*deojol-gild*), as they were termed in the Christian laws, proving extremely difficult, they were for the most part continued with the substitution of Christian for heathen rites.

Some guilds had for their principal object the mutual defence of their members and the preservation of peace; and by the laws of Ina and Alfred, in case of homicide of or by one of the members, the guild-brethren were to share in the receipt or payment of the *wergild* (*t*). The "frith gild."

But the form of guild which exercised the most permanent and extensive influence on the town constitution was the merchant-guild, *ceapmanne gild*, or *hansa*, to which all the traders of the town were, as a rule, obliged to belong (*u*). At first independent of the governing body of the town, the merchant-guild gradually coalesced with it, monopolising the rights which had originally belonged to all the free inhabitants. But the process was a very slow one, and though it began prior to the Norman conquest, its principal development proceeded during the two centuries following that event. "In the reign of Henry II.," says Stubbs, "there can be little doubt that the possession of a merchant-guild had become the sign and token of municipal independence; that it was in fact, if not in theory, the governing body of the town in which it was allowed to exist. It is recognised by Glanvill as identical with the communa of the privileged towns, the municipal corporation of the later age" (*w*). The merchant-guild.

(*s*) Lappenberg, England under the Anglo-Saxons, by Thorpe, ii. 350.

(*t*) In the Judicia Civitatis Lundoniae, drawn up under King Athelstan (*cir.* 930) by the bishops and reeves belonging to London, and confirmed by the pledges of the "frith-gegildas," is preserved a complete code of a "frith-gild" of the city of London, with minute directions for the pursuit and convictions of thieves, the exacting of compensation, and the carrying out of the dooms which Athelstan and the Witan had enacted at Greatley, Exeter, and Thundersfield.—Thorpe, Anc. Laws and Inst.; Select Chart., 65.

(*u*) See *infra*, p. 221, note.

(*w*) Const. Hist., i. 453. [*Cf.* For the rise and mediæval importance of guilds, Raumer, Geschichte der Hohenstaufen (Leipzig, 1825), vol. v. pp. 377-380; C. Gross, The Gild-Merchant (Oxf., 1890); Gneist, Hist. Engl. Const., p. 124, note, and p. 436, and authorities cited; Ency. Brit. 11th ed. sub. "Gilds," vol. xii. pp. 14-17, and the bibliography there given.—Ed.]

The City of London.

The City of London has always occupied an exceptional position, and though it has never stood to the rest of England in the same peculiar relation as Paris to the rest of France, it has just claims to be regarded, even in very early times, as "a member of the political system" (*x*).

Its constitution analogous to that of the shire.

Whilst the constitution of ordinary towns resembled that of the hundred, the constitution of London was analogous to that of the shire. From time immemorial the City has been divided into wards, answering to the hundreds in the shire, each having its own wardmot, answering to the hundred court, and its elected ealdorman. The chief municipal court—the general assembly of the citizens—was called the *Hus-thing*, whence the modern name Husting, a term derived probably from the Danes, and signifying a court or assembly in a house as distinguished from one held in the open air. Side by side with the jurisdiction of the several wardmotes, landowners, both secular and ecclesiastical, possessed their exclusive sokens or jurisdictions within the city and its outlying liberties. These private sokens gradually gave way before the increasing power of the citizens; but while they existed, the inclusion of an aristocratic element within the municipality doubtless added much to its power and influence, until the citizens were strong enough to hold their own as a purely commercial community.

Towards the close of the pre-Norman period the two chief officers of the City of London, the representatives of the civic unity of the various wards, townships, parishes and lordships of which it was composed, were the port-reeve and the bishop. It is to these two that the charter of William the Conqueror confirming to London the laws which it had enjoyed under King Edward is addressed: "William the King greets William the Bishop and

Charter of the Conqueror to London.

(*x*) Hallam, Midd. Ages, iii. 24 (11th edit.). According to Roger Hoveden, the citizens of London, on the death of Ethelred II., joined with a portion of the nobility in raising Edmund Ironside to the throne. They concurred, say the Saxon Chronicle and William of Malmesbury, in the election of Harold I.; and in later times they took an active part in the civil war between Stephen and Matilda. They sided with the barons in their contest with the Crown, and assisted in deposing Longchamp, the chancellor and justiciar of Richard I. The mayor of London was one of the twenty-five barons empowered to maintain the provisions of the Great Charter.

Gosfrith the port-reeve (*y*), and all the burghers within London, French and English, friendly: and I do you to wit that I will that ye twain be worthy of all the law that ye were worthy of in King Edward's day. And I will that every child be his father's heir after his father's day; and I will not endure that any man offer any wrong to you. God keep you" (*z*).

Ecclesiastical divisions.

The original bishopries were conterminous with the limits of the various kingdoms at the time of the conversion to Christianity; but under Archbishop Theodore the dioceses were subdivided on the lines of the still earlier tribal divisions. As churches were gradually erected throughout the country, the township, or, in thinly populated districts, a cluster of small townships, naturally became in its ecclesiastical aspect the parish of a single priest. Later on the hundred became the deanery, the shire the archdeaconry, while the whole consolidated kingdom formed the province of the metropolitan (*a*).

Ranks of the people.

Slaves.

Turning from the divisions of the land to those of the people, we find at the bottom of the social scale the mere slaves (*theowas, esnas*), of whom, under the name of *servi*, 25,000 are numbered in Domesday Book, or nearly one-eleventh of the registered population. These were of two kinds—(1) hereditary, consisting partly of the descendants of the conquered Britons, partly of persons of the common German stock either descended from the slaves of the first colonists or from freemen who had lost their liberty; (2) penal slaves (*wite-theowas*), freemen who had been reduced

(*y*) "The word *port* in *port-reeve* is the Latin *porta* (not *portus*), where the markets were held, and although used for the city generally, seems to refer to it specially in its character of a mart or city of merchants. The port-gerefa at Canterbury had a close connection with the 'Ceapmanne gild'; and the same was probably the case in London, where there was a cnihten-gild, the estates of which were formed into the ward of portsoken. From the position assigned to the port-reeve in this writ, which answers to that given to the sheriff in ordinary writs, it may be inferred that he was a royal officer who stood to the merchants of the city in the relation in which the bishop stood to the clergy: and if he were also the head of the guild, his office illustrates very well the combination of voluntary organisation with administrative machinery which marks the English municipal system from its earliest days."—Stubbs, Const. Hist., i. 439 n.

(*z*) Munim. Gildhallae., Lond., Lib. Custum. [pp. 25, 247]; Select Charters, 79.

(*a*) Stubbs, Const. Hist., i. 244-7.

to slavery on account of crime, or through failure to pay a *wergild*, or by voluntary sale—the father having power to sell his child of seven, and a child of thirteen having power to sell himself.

Freemen, Eorls and Ceorls.

As among the Germans of Tacitus we find the distinction between the noble and common freemen, so among the English the freemen were broadly divided into *eorls* and *ceorls*, the modern meaning of which may be rendered by *gentle* and *simple*, or esquire and yeoman.

The *Eorl*.

The rank of the *eorl* rested upon noble birth, and thus formed a perpetual barrier between him and the *ceorl*. But in England, as in other Germanic countries, a new kind of nobility speedily grew up—nobility by military service, which in the end superseded the nobility by birth.

The *Comitatus*.

This arose out of the development of the *comitatus*, described by Tacitus, the band of personal followers of the

Gesith.

king or other leader. These followers were the *gesithas* (= companions), their leader was the *hlaford* (= loaf-giver), in its modern form, lord, whose title was derived from his character of giver of gifts in acknowledgment of the services received. [The hlâfæta = "loaf-eater," or "comes," became the gesith.] The relation existing between the lord and his followers appears to have gradually assumed a somewhat lower type; the *gesith*, or

Thegn.

companion, became the *thegn* (= servant (*b*)); and the service of the king, or other great lord, was eagerly sought by freemen as well for the social dignity as for the material rewards which it ensured. We read of the king's dish-thegn (*disc-thegn*), bower-thegn (*bur-thegn*), and horse-thegn or stallere (*c*), as personages of high rank and great influence; a feature in our early institutions which has survived to the present day in such offices as those of lord chamberlain (bower-thegn) and master of the horse. Service to the king, or some great lord, gradually became

(*b*) ["As the King grew in importance and power, the companion or 'gesith' soon changed his original title for a new one, that more clearly expressed his somewhat changed relation. He became the *thegn* or servant instead of the companion of his lord."—H. Taylor, Engl. Const., p. 131. —Ed.]

(*c*) [The Staller (*comes stabuli*) = the Marshal (from O. H. G. *marah*, horse, and *scalh*, servant). Thorpe, *n.* to Lappenberg, A.-S. ii. 312.]

the only avenue to distinguished rank. The word *thegn* itself came to be regarded as synonymous with noble or gentle. Among this nobility by service the highest rank comprised the king's thegns, whilst in a lower class were the thegns of the ealdorman or bishop (*d*).

Connection between social status and ownership of land.

The dignity of thegn was closely (though not inseparably) connected with the possession of landed property; so much so that the possession of a certain quantity of land came to be regarded as a foundation of nobility. The simple freemen who acquired five hides of land entered into the ranks of the thegnhood (*e*). For the position of ealdorman the possession of at least forty hides was necessary. This intimate connection between social status and the ownership of large landed estates, which has continued with but slight modification down to our own times, may be traced even in the original institutions of our Teutonic ancestors (*f*).

Effects of growth of the thegnhood.

The development of the *comitatus*, or thegnhood, had very important effects. In the original Teutonic community, the monarchic and aristocratic elements were subordinate to the democratic element. The growth of the thegnhood, working in close alliance with the kingly power, which from motives of self-interest it was bound to support as the source of its own dignity, reversed this original relation. Thus the aristocratic and monarchic elements obtained a decided preeminence. Purely voluntary in its origin, service rapidly grew to be universally compulsory. It soon came to be regarded as a principle that every freeman, not being a *hlaford*, must be attached to some superior, to whom he was bound by fealty, and who, in return, was his legal protector and the guarantee for his good behaviour. The freemen had indeed the right of choosing the lord to

(*d*) See Kemble, Saxons in England, i. ch. vii., "the Noble by Service." [Freeman, Norm. Conq., vol. i. 60, and Maitland, Const. Hist., ed. Fisher, p. 147: "But it is not only the King who has thegns—great men may have them; indeed, it seems that a thegn may have lesser thegns dependent on him—just as in after-days the King's tenant, *in capite*, might have tenants holding of him by knights' service."—Ed.]

(*e*) [Stubbs, Const. Hist., vol. i. pp. 152, 153; Waitz, Deutsche Verfassungsgeschichte, ii. 262; Creasy, The English Const., p. 42; Gneist, Hist. Engl. Const., pp. 108, 109 and note.—Ed.]

(*f*) Tacit. Germ., c. xxvi.

whom he should, in technical language, *commend* himself; but if he failed to do so, his kindred were bound to present him to the shire court and name a lord for him. The lordless man was treated as a kind of outlaw, and might be seized like a robber by any one who met him. Having once commended himself to some lord, the freeman was prohibited from exchanging into the service of another lord in another shire without the consent of the ealdorman of the shire which he was desirous of quitting. Thus, "a new order of things," says Kemble (*g*), "was consummated, in which the honours and security of service became more anxiously desired than a needy and unsafe freedom; and the alods being finally surrendered, to be taken back as *beneficia*, under mediate lords, the foundations of the royal feudal system were securely laid on every side."

The Ceorls.

In one respect the absorption of eorldom into thegnhood had a liberalising effect. The *ceorl*, who could never become an *eorl*, might become a *thegn*, and so attain a rank practically equivalent to that of eorl. Thus the caste distinction of birth was broken through. The ceorl who acquired five hides of land (about 600 acres), with a church and mansion of his own, acquired also, as we have seen, the right to thegnhood. King Athelstan extended the privilege to the merchant who in his own vessel had made three voyages to foreign parts. This last was a remarkable exception, in favour of commerce, to the general polity of this period, in which the possession of land was almost essential to dignity and perfect freedom. On the whole, however, the ceorls as a class were probably depressed by the growth of the thegnhood (*h*). As there were degrees among the thegns, so among the ceorls there were various grades, according to the different relations in which they stood towards the hlafords, under whom they had placed themselves. Some had land, which again varied greatly in quantity; some were landless. The landless ceorl was practically little better off than the slave, except that he

(*g*) Saxons in England, i. 841.

(*h*) Freeman, Norm. Conq., i. 95-97. [Gneist, Hist. Engl. Const., pp. 75, 79; and on the whole question, H. Taylor, Engl. Const., p. 133 *seq.*—Ed.]

might commend himself to any lord he pleased; but still all ceorls were freemen and capable of becoming gentlemen. They were "law-worthy," and the *wer* of the lowest ceorl was payable to his kindred, not to the lord, to whom the composition for the murder of a slave would have belonged. In the Domesday survey the name of ceorl does not occur: but the class is mentioned under the names of *liberi homines*, *socmanni*, *villani*, *cordarii*, *cotarii*, and *cotseti*, indicating doubtless some peculiarity of service or tenure. They are always distinguished from the *servi* or serfs of the demesne. The socmen were probably ceorls who had acquired less than five hides of freehold land. They may be regarded as "the root of a noble plant, the free socage tenants, or English yeomanry, whose independence has stamped with peculiar features both our constitution and our national character" (*i*).

Above the thegns in dignity were the ealdormen. In the primitive patriarchal constitution the chief authority in each tribe seems to have been naturally exercised, in times of peace, by the eldest member. Hence the chief of the tribe was emphatically called ealdorman. When the chiefs of the Teutonic settlers assumed the regal style, the title of ealdorman gradually became restricted in its signification. From the time of Egbert it denoted a magistrate or viceroy appointed by the king and his witan, more especially the governor of a shire or large district. Under the Danish kings in the eleventh century, the title of ealdorman was generally supplanted by that of eorl or earl, as the official title of the governor of a shire or province (*k*). Ealdormen.

By this time the word *eorl*, in its original signification of gentle birth, had, as we have seen, itself been supplanted by *thegn*. From about the period of the Norman conquest the title of ealdorman underwent a further restriction, and has survived to our days only as the designation of city and borough magistrates.

As the result alike of their almost entire monopoly of learning and of the veneration, not unmixed with superstition, The Clergy.

(*i*) Hallam, Midd. Ages, ii. 274.

(*k*) The title of *eorl* occurs early in the laws of the Kentish kings (Laws of Ethelbert, xiii., xiv.), and was probably of Jutish origin, but its use as a substitute for ealdorman was borrowed from the Danish *jarl*.

which the sacerdotal character inspired in the laity, the clergy, as a class, held a very high political and social status (*l*). The poorest priest ranked as a mass-thegn; the bishop was on a par with the ealdorman and presided with him in the shire-moot, and the archbishop was never valued, in the eye of the law, at less than an atheling, or member of the king's family. Whilst all laymen, even of the highest rank, were bound to find a number of compurgators in addition to their own oath, in order to clear themselves from a charge, the simple oath of a priest was accepted as sufficient. The archbishop, like the king, merely gave his word, without an oath. In every great council the prelates appear to have taken a prominent part, church and state working together in the closest alliance; while for purely church matters the clergy, from an early period, had their own synods.

The king.

At the head of the nation was its elected chief and representative, the cyning or king. At the period of which we are now treating, the English kingship was in a transition stage between the old Teutonic type and the later mediæval type, into which it developed in the reign of Henry II. The people were still the source of power, and the king was their minister, not their master. The royal power was strictly limited by that of the witan or national council, which, though not a representative assembly in the modern acceptation of the word, stood in relation to the king as the representative of the people. All the laws of the kings express the assent of this council, and there are even instances of royal grants of public land made without its concurrence being revoked. With the extension of the national territory and the growth of the thegnhood, the personal dignity and power of royalty gradually but steadily increased. The king became the personal lord as well as the

(*l*) Lappenberg (England under the Anglo-Saxons, ed. Thorpe, ii. p. 322) suggests, as a further explanation of the high position of the Christian priesthood, the account given by Tacitus of the vast influence in secular affairs possessed by the Pagan German priesthood, in whom exclusively resided the power of life and death. "Such a primitive influence tended, no doubt, greatly to facilitate the domination of the Roman papal church, and a part of their jurisdiction, the ordeals or so-called judgments of God, may have had their origin in the legal usages of the heathen priests."

chief and representative of his people. From the time of Athelstan the kings began to assume imperial titles, with which the extensive European connections of that sovereign had doubtless rendered them familiar (*m*). These titles were probably not mere grandiloquent sounds, but were intended to proclaim the imperial character of the sway which the king of the English asserted over the inhabitants of the whole island, and his independence of any external potentate. In his imperial character, as overlord, the king called himself *rex*, *imperator*, *casere*, *basileus*, *totius Britanniae* or *totius Albionis;* but in his regal character he is still king of the people, not lord of the soil—*rex Anglorum*, not *rex Angliae* (*n*). The prerogatives and immunities of the king were extensive. Like every other individual, he had originally a *wer-gild*, or fixed price for his life; but Alfred made plotting against the king's life "death-worthy." He was entitled to maintenance for himself and retinue in public progresses; to all treasure-trove, wrecks, tolls, the profits of markets, mines, and salt-works, and to the forfeited possessions of outlaws. A *wite*, or fine, was also payable to him, on every breach of the law, in addition to the compensation (*bot*) due to the person injured. The breach of the king's *frith* or peace, and the violation of his *mund* (*o*), or special security granted to any one, were severely punished. He alone had *sac*, or jurisdiction, over persons of the highest rank. Together with the duty of executing justice in the last resort he possessed the prerogative of mercy. He was commander-in-chief of the national host (*fyrd*), and might accept money compositions in lieu of personal service. With regard to certain classes of offences he was even clothed with an arbitrary jurisdiction, and might either slay, fine, imprison, or banish the culprits, at his own pleasure.

(*m*) Five of Athelstan's sisters were married to foreigners.

(*n*) On the imperial character of the early English kings, see Palgrave, Eng. Commonwealth, pp. 627, cccxliii., cccxliv.; and Freeman, Norm. Conq., i. 148.

(*o*) The original signification of "mund" is *hand*. It specially denoted the power of the head of the family over his wife, children, and slaves, in which sense it may be compared with the similar use of *manus* in the ancient legal phraseology of the Romans. [*Cf.* Stubbs, Const. Hist., p. 200, note. —Ed.]

The queen.

The consort of the king, in accordance with the high respect in which women were held by the Germans, seems to have occupied a very exalted position. She was styled emphatically "the wife" (*cwen*) and lady (*hlæfdige*). Her privileges and possessions were probably considerable, although we have but few specific details concerning them. The crimes of Edburga, who poisoned her husband King Brihtric, caused the West Saxons, for a considerable period, to withhold from the king's wife the name and authority of queen. In 856 Ethelwulf gave deep offence to his people by causing his second wife, Judith, to be crowned; but from the date of Edgar's second marriage with Elfrida, in 965, the rank of queen appears to have been restored. Emma, wife and queen of Ethelred II., seems to have held the city of Exeter as her peculiar property, and to have governed it by her own officers. In Mercia and East Anglia the queen-consort was entitled to the payment of an extra tenth, called *aurum reginae* (*gersuma*), or queen-gold, on every fine or oblation of more than ten marks paid to the king. This ancient due was claimed so late as the time of Charles I., by Queen Henrietta Maria (*p*).

The athelings.

The sons and brothers of the king were distinguished by the title of athelings. The word atheling, like eorl, originally denoted noble birth simply; but, as the royal house of Wessex rose to preeminence, and the other royal houses and the nobles generally were thereby reduced to a relatively lower grade, it became restricted to the near kindred of the national king. The more remote members of the royal house fell into the ranks of the ordinary nobility without any distinctive appellation, on the same principle as [that by which] the descendant of an English nobleman at the present day, if not heir to the ancestral title, bears, in the third generation, no external sign of his noble relationship. The athelings ranked above the rest of the nobility, the penalty for a violation of their rights being generally fixed at one-half of that payable for a similar offence against the king.

(*p*) Lappenberg, A.-S. ii. 310, 311. On "Queen" and "Lady," see Freeman, Norm. Conq. iv. 768; Appendix X.

The supreme council of the nation, the representative of the Teutonic national assembly described by Tacitus, and the progenitor of our own parliament, was the *Witenagemot*, or meeting of the wise. The Witenagemot.

Concerning the constitution of this assembly there exists considerable difference of opinion. It is admitted that in the local *gemots* every freeman had a right to attend. In the gemot of his own mark or township—whose modern representative is the parish vestry—every Teutonic freeman was entitled to a voice. So every freeman, whether eorl or ceorl, had a voice in the folkmoot of the shire, the shire-moot or county court of later times. But here the divergence makes itself manifest. According to one view (*q*), every freeman had also the right to attend the national assembly, although this right had practically gone out of use at an early period. The witenagemot was "democratic in ancient theory, aristocratic in ordinary practice," a view which to a certain extent is supported by the high authority of Kemble (*r*). According to another view the central assembly was never formed on the model of the lower courts as the folkmoot of the whole nation, the ordinary freemen never rising higher than their respective shire-moots: but yet, constructively, the witenagemot represented the whole people, whose rights, as against the king, were all vested in this assembly (*s*). Its constitution.

Whatever may have been its theoretical constitution, there is no doubt that practically it was an aristocratic body. Its members were the king, the ealdormen, or governors of shires, the king's thegns, the bishops, abbots, and generally the *principes* and *sapientes* of the kingdom. *Sapientes* = witan = wise men, was the common title of

(*q*) Freeman, Norm. Conq., i. 107.

(*r*) Kemble (Saxons, ii. 239, 240), after quoting from charters expressions which would seem to imply the presence and consent of the mass of the people in the national assembly, remarks: "Whether expressions of this kind were intended to denote the actual presence of the people on the spot; or whether *populus* is used in a strict and technical sense—that sense which is confined to those who enjoy the full franchise, those who form part of the πολίτευμα—or finally, whether the assembly of the witan making laws is considered to represent in our modern form an assembly of the whole people, it is clear that the *power of self-government is recognised in the latter.*"

(*s*) Stubbs, Select Chart., Introductory Sketch, 10, 11; and Const. Hist., vi. *seq.*

those who attended it. The lesser thegns, if entitled to be present, did not, probably, attend in any numbers, so that the assembly can never have been very large. "The largest amount of signatures," says Kemble, "which I have yet observed is 106, but numbers varying from 90 to 100 are not uncommon, especially after the consolidation of the monarchy. In earlier times, and smaller kingdoms, the numbers must have been much less. . . . Other meetings, which were rather in the nature of conventions, and were held in the presence of armies, may have been much more numerous and tumultuary much more like the ancient armed folkmoot on the famous day which put an end to the Merwingian dynasty among the Franks. Such, perhaps, was the gemot which, after Eàdmund Irensída's death, elected Cnut sole king of England, or that in which Earl Godwine and his family were outlawed" (*t*).

Although the witenagemot was not a representative body in the modern sense, it was unquestionably looked upon as representing the whole people and consequently the national will (*u*). The ancient principle of representation, after a period of obscuration, was restored in another shape by De Montfort and Edward I. in the thirteenth century.

Its powers.

The powers of the witenagemot were most extensive, greater even than those of the modern parliament.

Deposition of the king.

(1) It had the power of deposing the king for misgovernment (*w*). So great a step would obviously only be taken at rare intervals. In Northumbria, indeed, the deposition of kings, with more or less of violence and bloodshed, is extraordinarily frequent; but two only, Ethelwald (probably) in 765, and Alcred (certainly) in 774, can be said to have been regularly deposed by the witenagemot (*x*).

(*t*) Kemble, Saxons in England, ii. 200, 201, n.

(*u*) In a charter of Athelstan, in 931, the act is said to have been confirmed "tota plebis generalitate ovante"; and the act of a similar meeting at Winchester in 934, which was attended by the king, four Welsh princes, two archbishops, seventeen bishops, four abbots, twelve dukes, and fifty-two thegns, making a total of ninety-two persons, is described as being executed "tota populi generalitate."—Kemble, Saxons, ii. 199.

(*w*) Kemble, Saxons, ii. 219.

(*x*) As to Alcred, see Sim. Dun. ann. 774. Of fifteen kings of Northumbria in the eighth century, thirteen ended their reigns by extraordinary means. See the list in Stubbs, Const. Hist., i. 153.

In the royal line of the West Saxons, which grew into the royal line of the English, there were together three instances of deposition by the witan before the Norman conquest. In 755, Sigebert of Wessex was deposed by the witan, and Cynewulf, his kinsman, elected in his stead (*y*). Ethelred II. was in like manner practically deposed in 1013, and again restored in 1014 (*z*); and in 1037 Harthacnut (who had reigned as king of the West Saxons, while his brother Harold reigned to the north of the Thames, probably with a supremacy over the whole kingdom) was deposed in Wessex and Harold chosen king over all England (*a*). Since the Norman conquest, the deposing power has been three times exercised by the national parliament, in the cases of Edward II. in 1327, Richard II. in 1399, and James II. in 1688 (*b*).

Election of kings.

(2) The witenagemot had the power of electing the king. All the old Teutonic kingdoms were elective; but in every kingdom there was a royal family, out of which the witan had the right to elect the most competent member to discharge the functions of king. The eldest son of the last king, if of full age and not manifestly incompetent, was usually chosen to succeed his father. But at a period when the personal character and military prowess of the king were of the utmost importance, minorities were too dangerous to be endured. Thus Ethelred I., in 866, was chosen in preference to the issue of his elder brother, and at his own death in 871, leaving only young children, was himself succeeded by his younger brother Alfred. King

(*y*) Chron. Angl.-Sax., ann. 755; Flor. Wigorn., ann. 755; and Kemble, Saxons, ii. 219.

(*z*) Flor. Wig. ann. 1013, 1014; Chron. Angl.-Sax. 1014. The ealdormen of Wessex and all the thegns of the West came to Swend at Bath and submitted to him, giving hostages. "Putting the language of the different accounts together," says Freeman (Norm. Conq., i. 396), "there can be little doubt that this was, or professed to be, a formal act of the Witan of Wessex, deposing Ethelred and raising Swend to the throne."

(*a*) Chron. Angl.-Sax., ann. 1037 (Earle, p. 166).

(*b*) *Infra*, chap. vi. Henry VI. was not, strictly speaking, deposed by parliament. When Richard, Duke of York, claimed the throne, a parliamentary compromise was come to between them; and Henry, who was looked upon by the Yorkists as having broken this compromise, was ultimately set aside by a purely partisan assembly. Charles I. was never deposed, but tried and executed *being king* [for which, and for the deposing power, *cf.* Freeman, Norm. Conq., i. 114, 115].

Athelstan again, though reputed illegitimate, was preferred in 925 to the younger but legitimate sons of Edward the Elder (*c*). In 946 Edwy, son of Edmund, was passed by in favour of his uncle Edred; but on Edred's death in 955 was elected to the exclusion of that king's issue. In 1042 Edward the Confessor was chosen in preference to the absent son of his elder brother Edmund Ironside. Finally, in 1066, the whole royal house was passed by, and Earl Harold, the most able general and statesman of his time, was elected king. The race of Cerdic had once before been passed by, when, in 1017, Cnut was chosen king; but this election, though good in form, was made under duress. A certain preference seems to have been given to the issue born after the accession of the father to the throne—the *porphyrogeniti*, sons born in the purple: and a certain preference was also acquired by the *recommendation* of the last king; thus Edgar recommended his son Edward to the witan, and Edward the Confessor recommended Earl Harold (*d*). But on every fresh accession "the great compact between the king and the people was literally as well as symbolically renewed, and the technical expression for ascending the throne is being 'gecoren and âhafen to cyninge,' elected and raised to be king; where the *âhafen* refers to the old Teutonic custom of what we still at election times call chairing the successful candidate; and the *gecoren* denotes the positive and foregone conclusion of a real election" (*e*).

The witan participated in every act of government.

(3) The witenagemot had a direct share in every act of government. In conjunction with the king, the witan enacted laws and levied taxes for the public service; made alliances and treaties of peace; raised land and sea forces when occasion demanded; made grants of folkland; appointed and deposed the bishops, ealdormen of shires, and other great officers of church and state; adjudged the lands of offenders and intestates dying without heirs to be forfeit to the king; and authorised the enforcement of ecclesiastical

(*c*) Illegitimacy, however, says Kemble, "was not considered a valid ground of objection among the Anglo-Saxons, if the personal qualities of the prince were such as to recommend him."—Saxons in England, ii. 37, n:

(*d*) See Freeman, Norm. Conq., i. 118.

(*e*) Kemble, Saxons in England, ii. 215.

decrees. Lastly, the witan acted from time to time as a supreme court of justice, both in civil and criminal causes (*f*).

But although the powers of the witan were so extensive, the active exercise of them varied greatly with the personal character and influence of each occupant of the throne. Strong kings, like Alfred and Athelstan, were able, by the legitimate exercise of personal influence, to lead the witan in whatever direction they pleased, and thus to attain the practical enjoyment of supreme power. Towards the close of the pre-Norman period, many of the powers which had been originally shared by the king and the witan were in fact exercised by the king alone; but in the two cardinal matters of legislation and the imposition of extraordinary taxation, the right of the witan to give counsel and consent was at all times recognised.

These powers not always exercised.

The great original principle of the English judicial system was that of trial in local courts popularly constituted,

Judicial system.

(*f*) See Kemble, Saxons in England, ii. 204-240, where numerous examples will be found of the exercise by the witan of all the powers enumerated in the text. These powers were grouped by him into the following twelve canons :—

"i. First, and in general, they possessed a consultative voice, and right to consider every public act, which could be authorised by the king.

ii. The witan deliberated upon the making of new laws which were to be added to the existing folcriht, and which were then promulgated by their own and the king's authority.

iii. The witan had the power of making alliances and treaties of peace, and of settling their terms.

iv. The witan had the power of electing the king.

v. The witan had the power to depose the king, if his government was not conducted for the benefit of his people.

vi. The king and the witan had the power to appoint to vacant sees.

vii. They had also the power to regulate ecclesiastical matters, appoint feasts and festivals, and decide upon the levy and expenditure of ecclesiastical revenue.

viii. The king and the witan had power to levy taxes for the public service.

ix. The king and the witan had power to raise land and sea forces when occasion demanded.

x. The witan possessed the power of recommending, assenting to, and guaranteeing grants of lands, and of permitting the conversion of folcland into bócland, and *vice versa*.

xi. The witan possessed the power of adjudging the lands of offenders and intestates to be forfeit to the king.

xii. Lastly, the witan acted as a supreme Court of Justice, both in civil and criminal causes."

or as it was termed in later times, trial *per pais*, in the presence of the county as opposed to a distant and unknown tribunal. This was at once an evidence of freedom and the surest guarantee for its permanence. But before describing the different local courts it is necessary to notice, shortly, the principle of pledges, by which provision was made that every man should be either personally forthcoming, or have some representative bound to answer for him, in every case of litigation.

Frank-pledge.

A collective responsibility for producing an offender appears originally to have lain upon the *mægth* or community of the kindred (*g*); it then devolved upon the voluntary associations called *guilds*; and later on the guild was superseded by the local responsibility of the *tithing*, the exact nature of which is doubtful, but which seems to have been a personal and territorial subdivision of the hundred practically identical with the township. Eventually, though probably not much earlier than the Norman conquest, for the local tithing was substituted the personal collective *frithborh*, or frankpledge. Every freeman not being a hlaford, was bound to be enrolled in a frithborh, or *tenmannetale* as it was called in the north: that is, an association of ten men who formed a perpetual collective bail for the appearance of any one of their number when required to answer in a court of law. Each association had its head-man, the *borhs-ealdor*, or *frithborgehead*, who was also called the *tithing-man*, as the body of ten was also called the *tithing*. If an accused member appeared and was condemned, he had to make reparation by his own property or by personal punishment: but if he fled from justice, the other members of the tithing, in default of exculpating themselves from all share in his crime or escape, were pecuniarily liable for the penalty.

Responsibility of the *Hlaford* for his dependents.

Side by side with the collective responsibility of the local community or of the personal association, was the individual responsibility of the *hlaford* for his men. By a law of Athelstan, every landless man was to have a lord to

(*g*) Schmid notes, however (Ges. d. A.-Sachs.), that the wife did not enter her husband's mægth on marriage, but remained in her own, and her kindred alone made compensation.

answer for his appearance; and by an ordinance of King Edgar it was enacted: "Let every man so order that he have a 'borh' [surety]; and let the 'borh' then bring and hold him to every justice; and if any one then do wrong and run away, let the 'borh' bear that which he ought to bear. But if it be a thief, and if he can get hold of him within twelve months, let him deliver him up to justice, and let be rendered unto him what he before had paid" (*h*).

The Hundred-moot.

The two principal local courts were those of the hundred and the shire. The hundred court was held once a month, under the presidency of the hundred-man, or hundreds-ealdor (*i*). The judges of the court were originally the whole body of freeholders within the hundred; but, probably from motives of convenience, it soon became the custom to delegate the judicial powers of the whole body of suitors to a representative committee, generally twelve or some multiple of twelve in number, and either chosen for the occasion or permanently appointed. The court of the hundred exercised jurisdiction both civil and criminal, voluntary and contentious: and litigants were bound to seek justice in this court before applying to a higher tribunal. As the king was entitled to a *wite*, or fine, for every offence, his reeve was accustomed to attend the court twice in each year. On the institution of the frithborh or frankpledge, the hundred court, on the two yearly occasions when it was attended by the reeve, undertook the duty of seeing that every man was regularly enrolled in his tithing, a practice which continued long after the Norman conquest as the sheriff's tourn, or leet, and view of frankpledge.

Private jurisdictions.

From an early period certain districts within the hundred were detached from its jurisdiction and subjected to the *soca* of the church or of the secular hlafords to whom they belonged. Such districts formed private *franchises* or *liberties*, and the name "*sithesocna*," by which they were sometimes denoted, points to their origin in grants made by the king to his *sith* or *gesith*, and at a period before the

(*h*) Edgar's Ordinance of the Hundred, cap. 6. On the origin and nature of the Tithing and the Frithborh or Frankpledge—the subject of a great literature—see Stubbs, Sel. Chart., 68, and Const. Hist., i. 92-95.

(*i*) *Supra*, p. 17.

title of gesith had been supplanted by that of thegn. The hlaford possessing a private soken over his lordship, or manor as it was subsequently termed, was wont to dispense justice in the hall of his mansion, whence his court was called a hall-mote, the progenitor of the feudal court-baron, which is not even now extinct. Sometimes the jurisdiction of a whole hundred, or of several hundreds, was granted to churches or private individuals. In this way the organisation of the hundred was considerably weakened, and the administration of justice became to a large extent not national or royal, but territorial and feudal.

The Shire-moot.

The *scir-gemot*, or, as it was called after the Norman conquest, the County Court, was not only the court of the shire, but also the *folc-gemot*, the general assembly of the folk of the shire, a name which points to the original independence of the population of each shire (*k*). The shiremoot was convened by the sheriff twice in a year. It was attended by the ealdorman, the bishop, and all other public officers, by all lords of lands, and by the representative reeve and four men and the parish priest from each township. These, collectively, formed the judges of the court; but as in the hundred, so in the shire, the twelve senior thegns acted as a body of councillors or assessors, and declared the report of the shire. The jurisdiction of the shiremoot extended to every kind of suit, except such as concerned a high officer of state, or a king's thegn, which were reserved for the king's immediate cognisance. But the shiremoot could not be resorted to until justice had first

(*k*) "If the shire be the ancient under-kingdom, or the district whose administrative system is created in imitation of that of the under-kingdom, the shiremoot is the folkmoot in a double sense, not merely the popular court of the district, but the chief council of the ancient nation who possessed that district in independence, the witenagemot of the pre-heptarchic kingdom. Such a theory would imply the much greater preponderance of popular liberties in the earlier system, for the shiremoot is a representative assembly, which the historical witenagemot is not; and this is indeed natural, for the smaller the size of the districts and the more nearly equal the condition of the landowners or sharers in the common land, the more easy it would be to assemble the nation, and so much the less danger of the supreme authority falling into the hands of the king and the magistrates without reference to the national voice. But this can only be matter of conjecture."—Stubbs, Const. Hist., i. 130.

been sought and denied in the court of the hundred; and on the same principle no appeals could be carried to the king, unless the shiremoot had previously failed to do justice. The court of the shire, though it gradually lost much of its importance after the Norman conquest, especially after the institution of the justices itinerant, long continued to exercise an extensive civil jurisdiction in small causes, and remained the general assembly of all the freeholders of the shire for county purposes. As an instrument in limiting the power of the feudal aristocracy, it "contributed in no small degree to fix the liberties of England upon a broad and popular basis" (*l*).

Procedure.

Nearly all the work of judicature consisted in the declaration of the law applicable to each case, as distinguished from the finding of the facts. The *law* was declared by the presiding magistrates the ealdorman, or sheriff, and the bishop and the select body of assessors. The *facts* (except in a certain class of civil causes to be presently noticed) were decided either by compurgation or by ordeal.

Compurgation.

1. The accused might clear himself by his own oath strengthened by the oaths of certain compurgators, usually twelve in number, and either his relatives or immediate neighbours, who testified to the trustworthiness of the person on whose behalf they came forward. The compurgators were in reality "witnesses to character" (*m*). But the oaths of different men varied in legal value and credit according to the rank and property of the swearer. The oath of one ealdorman counterbalanced that of six thegns, the oath of one thegn that of twelve ceorls. If the accused were subject to a hlaford, the lord or his gerefa might offer to swear on behalf of the vassal. But if the testimony of the lord were not in his favour, the accused vassal was bound either to produce a triple number of compurgators or to undergo an ordeal of threefold rigour. Not only the accused, but the accuser also, was bound to take an

(*l*) Hallam, Mid. Ages, ii. 277.

(*m*) The system of compurgation was common to all the Teutonic nations, but the number of compurgators required varied in the different nations.

oath (*for-ath*) that he was not actuated by interested or vindictive motives.

Ordeal.

2. But compurgation was not always allowed. In certain cases, as when a man was taken red-handed, or bearing other proofs of guilt, he was obliged to submit to the ordeal. The ordeal was also compulsory—(1) where the accused was unable to produce a sufficient number of compurgators; (2) where he had been notoriously guilty of perjury on a previous occasion; (3) where he was not a freeman—unless his hlaford swore to his belief in the innocence of the accused, or bought him off by paying the wergild.

The ordeal, or judgment of God, was of three kinds—hot iron, hot or cold water, and the corsnaed, or accused morsel. It was to be undergone (except as to the cold water ordeal) in a church, and under the superintendence of the priests. It is very difficult for us to understand how even the most innocent could have escaped condemnation under this process, except by the collusion of the officials; but there is no doubt that in its origin the ordeal was intended as a reverent appeal to God, in the firm belief that He would make the truth manifest.

Legally appointed witnesses to bargains.

3. Besides the compurgators, or witnesses to character, there was also in civil causes a special class of witnesses appointed by law for the attestation of facts—bargains and sales. In some respects they are analogous to the public notaries of the present day. They are first mentioned in a law of King Athelstan (A.D. 924-940), which enacted that there should "be named in every reeve's 'manung' (district) as many men as are known to be unlying, that they may be for witnesses in every suit" (*n*). But the most explicit information about these legal witnesses is contained in the Laws of Edgar (959-975): "This, then, is what I will: that every man be under 'borh' both within the 'burhs' and without the 'burhs'; and let witness be appointed to every 'burh' and to every hundred. To every 'burh' let there be chosen xxxiii as witness. To small 'burhs' and in every hundred xii, unless ye desire more. And let every man, with their witness, buy and sell every of the chattels that he may buy or sell, either

(*n*) Conc. Exon., cap. i. (Thorpe, Anc. Laws and Inst.). [Sel. Chart. 65.]

in a 'burh' or in a wapentake; and let every of them, when he is first chosen as witness, give the oath that he never, neither for money, nor for love, nor for fear, will deny any of those things of which he was witness, nor declare any other thing in witness save that alone which he saw or heard; and of such sworn men let there be at every bargain two or three as witness" (*o*). The sworn testimony of these legally appointed witnesses was decisive of any dispute which might subsequently arise (*p*).

Punishments.

The principle that every injury either to person or property might be compensated by a money payment was common to all the northern nations. It was introduced into Gaul by the conquering Franks, and into Britain by the English invaders. Every man's life had a fixed money value, called the *wergild*. In the case of a freeman, this compensation for murder was payable to his kindred; in that of a slave, to his master. The amount of the wergild varied, according to a graduated scale, with the rank of the person slain. For a ceorl it was fixed at 200 shillings; for a lesser thegn, 600 shillings; for a king's thegn, 1200 shillings (*q*). The *wer* of an ealdorman was double that of a king's thegn, that of an atheling three times, that of a king usually six times as much. For bodily injuries a *bôt* was payable, being highest in amount where any disfigurement ensued (*r*). In every case the king was entitled to a *wite*, or fine, for the breach of his peace. In the course of time capital punishments were introduced for offences against the state, or the king as its representative. Alfred declared that treason against a lord he dared not pardon; and fighting in the king's hall, coining, and several other state offences were made "death worthy." At a later period the severity of the laws increased, especially as to theft, which was sometimes capitally punished. But

(*o*) Edgar, Secular Ordinance, Suppl., cap. 3, 4, 5, 6. [*Id.* 71, "*borh*" =surety, "*burh*"=town.]

(*p*) For the ancient English judicial system, see Forsyth, Trial by Jury, pp. 54-92.

(*q*) From the amount of his *wer* a thegn was sometimes called a *twelf-hynde man* (hynde, hund, here=a hundred), a lesser thegn a *six-hynde man*, and a ceorl a *twy-hynde man*.

(*r*) The *bôt* for the smallest disfigurement of the face was three shillings, the same as for breaking a rib.

neither severity nor lenity seems to have availed to restrain the general turbulence of the people. The laws are filled with complaints of the open violations of the public peace. The relatives of a murdered man freely maintained the right to vengeance, and "open morth," as the private feud was termed, frequently went on for a long period between the two families. The law of money compensation must be regarded therefore as showing rather what society was intended to be, than what in very many instances it actually was. For certain offences, the punishment of exile was inflicted; and the man who fled from trial became an outlaw, whom any one might slay as he would a wild beast.

Ancient English laws. (600-1066.)

The laws of the English, the most ancient of modern laws, extend in an unbroken series from the laws of Ethelbert, the first Christian king of Kent (600), down to the present time. The earliest written collections are simply digests of local unwritten customs which have been handed down by oral tradition, and which were now put into writing to meet the requirements of a more developed and centralised state organisation. Many of these early laws consist of amendments of older unwritten customs, and from our lack of knowledge of the customs intended to be amended, are necessarily somewhat obscure. Even when the laws are clear, the great bulk of them "concern chiefly such questions as the practice of compurgation, ordeal, wergild, sanctity of holy places, persons or things: the immunity of estates belonging to churches, and the tables of penalties for crimes, in their several aspects as offences against the law, the family, and the individual" (*s*). But scattered through the collection there occur from time to time many enactments of the highest interest and importance as elucidations of the early history of the constitution (*t*).

Early attempts at codification.

Some of these laws, *e.g.*, those of Alfred (890), of Ethelred (978-1016), of Cnut (1016-1035), and those ascribed to Edward the Confessor (1043-1066), exhibit traces of early attempts at codification. But the name

(*s*) Stubbs, Sel. Chart., 60.

(*t*) These passages are collected in Stubbs, Select Charters, pp. 60-75.

"code" cannot with propriety be applied to them. They are unsystematic and fragmentary, and such general principles as they enunciate are not legal definitions, but maxims drawn from religion or morality.

Alfred as a legislator.

Of all our early kings, Alfred the Great has enjoyed the widest fame as a legislator. Popular legend has represented him as the personal author of nearly all our institutions, of many of which the germs existed ages before, while the existing form cannot be discerned till ages after him. There is no doubt that, like many others of our early kings, Alfred collected and arranged the laws of his predecessors: but his real position, as a compiler of old rather than an originator of new legislation is accurately set forth by himself in the preamble to his "dooms": "I then, Ælfred, King, these together gathered, and had many of them written which our fore-gangers held, those that me-liked. And many of them that me-not-liked, I threw aside, with my Wise Men's thought, and no other wise bade to hold them. For why, I durst not risk of my own much in writ to set, for why, it to me unknown was what of them would like those that after us were. But that which I met, either in Ine's days my kinsman, or in Offa's the King of the Mercians, or in Æthelberht's that erst of English kin baptism underwent, those that to me rightest seemed, those have I herein gathered, and the others passed by. I then, Ælfred, King of the West Saxons, to all my Wise Men these showed, and they then quoth that to them it seemed good all to hold" (*u*).

The Dooms.

The general features of the institutions and laws of the English people during the five hundred years preceding the

(*u*) Alfred's Dooms. Thorpe, Anc. Laws and Institutes, i. 58, 59; Freeman, Norm. Conq., i. 53. [See Maitland, Const. Hist., pp. 2, 3: "Beginning with Alfred's we have now a continuous series of laws covering the whole of the tenth century and extending into the eleventh, laws from Edward the Elder, Æthelstan, Edmund, Edgar and Ethelred. . . . These Anglo-Saxon laws or dooms—as they call themselves—after having lain hid in MS. for several centuries, were dug up in the sixteenth century as antiquarian curiosities. Lambert published some of them in 1568 under the title Archaionomia. In 1840 they were published for the Record Commissioners under the title Ancient Laws and Institutes of England: they were again published in 1865 with a German translation by Dr. Reinhold Schmid." Note ref. "The best edition is now that of F. Liebermann, Die Gesetze der Angelsachsen, 2 vols. Halle, 1903 and 1906."—Ed.]

Local customs.

Norman conquest have now been briefly surveyed. In different districts and at different periods a great diversity of local customs prevailed; but amidst many varieties of detail the essential principles and general machinery of government possessed, throughout, the characteristics which have been described. It must not, however, be supposed that during this lengthened period the institutions of the English were at any time stationary. They were subject to a marked though gradual process of development, the general tendency of which may be described as a movement from the personal organisation characteristic of all ancient systems of government towards the territorial organisation which forms the basis of the modern state. At the beginning of the period, the Anglo-Saxon kings were the leaders of the people, not the lords of the soil, their jurisdiction was primarily over the persons of their subjects, not over the territories included within the geographical boundaries of their kingdom (*w*).

Development of institutions.

Towards the close of the pre-Norman period, the king, though still "King of the English," had become, in addition, lord of the English land. Nearly two centuries were indeed to lapse before King John should declare himself, on his great seal, *Rex Angliae* instead of *Rex Anglorum*, but the transition from the tribal to the territorial system, from the kingship of the people to the conception of the king as feudal lord of both kingdom and people, was already far advanced towards completion (*x*).

Power of the great nobles.

But whilst, in theory, the power of the king was rising higher and higher, it was practically limited by the simultaneous advance in the power of the great nobles, who were constantly tending towards a position not far removed from that of the great feudatories of the continent. Under Edward the Martyr the condition of England was not unlike that of France under Charles the Bald. The great earls, or ealdormen of provinces, were forming a separate order in the state inimical alike to the supremacy of the king and the liberty of their fellow subjects. Cnut divided the kingdom into four great earldoms or duchies;

(*w*) Palgrave, Eng. Commonwealth, pt. i. p. 62.
(*x*) Stubbs, Const. Hist., i. 183, 185.

and the same policy was continued by Edward the Confessor, in whose reign the whole land seems to have been divided among five earls, three of them being Earl Godwin and his sons Harold and Tostig. The power and statesmanship of William the Norman prevented the threatened disintegration of the kingdom.

CHAPTER II.

THE NORMAN CONQUEST.

Disputed succession to the crown.

On the death of Edward the Confessor (January 5, 1066), the succession to the crown was disputed. The heir of the house of Cerdic, Edgar the Atheling, grand-nephew of the late king, was not only of tender age, but, as his after-life showed, of feeble character and mediocre intellect. The political exigencies of the kingdom imperatively demanded an able and resolute man at its head. King Edward on his death-bed had recommended as his successor his brother-in-law, Earl Harold. The earl was the most able general and statesman of the time, already exercising a quasi-royal authority through his own personal influence and the vast possessions of the Godwin family, and, though lacking the blood of Cerdic in his veins, was allied to the English royal house by affinity, and by blood to the Danish house which had so lately occupied the throne (*a*). The witan, who were at this time assembled in their ordinary mid-winter session, approving of Edward's recommendation, elected Earl Harold King of the English, and he was forthwith anointed and crowned by Afred, Archbishop of York (*b*).

Earl Harold.

William, Duke of Normandy.

But there was another competitor for the crown in the person of William, Duke of Normandy, who was cousin to Edward the Confessor through that king's mother, Emma of Normandy, and now claimed the throne under an alleged earlier appointment of his late kinsman. If such appointment or promise had indeed been made, which seems probable (*c*), it was superseded by the last expression

(*a*) Harold's mother, Gytha, was a sister of Ulf Jarl and first cousin once removed of King Cnut.—Thorpe's Lappenberg, Ang. Sax., pp. 280, 370.

(*b*) Flor. Wigorn., an. 1066.

(*c*) See Freeman, Norm. Conq., ii. 296-304.

of King Edward's wishes. Under any circumstance it could merely amount to a recommendation to the witan. A king of the English had never possessed a constitutional right to bequeath his kingdom like a private estate. The right of electing a king resided in the witan alone, acting on behalf of the whole nation. Their choice, it is true, had hitherto, when freely exercised, been restricted to the members of the royal house; but failing an eligible descendant of Cerdic, the choice of the nation was unlimited.

The Conquest.

William, however, professed to be merely asserting his legal right. Having secured the moral and religious support of the papal benediction, which the Roman see, in its anxiety to reduce the independence of the national English church, was most ready to bestow, and leading a large army of Normans and other foreigners, all inured to warfare and eager for booty, William landed in England to decide by the fate of arms between himself and the "usurper" Harold. At the decisive battle of Senlac the Normans were victorious, Harold, his brothers, and the flower of English thegnhood being left dead on the field. Although on the news of Harold's death, the Londoners at once chose Edgar Atheling king, disunion and the lack of effective organisation prevented any successful resistance to the onward march of the invaders. William had as yet conquered but a very small portion of the kingdom, but such was the panic of the nation, that he was elected king by the witan, and crowned at Westminster on Christmas Day, 1066, by the same Archbishop Aldred who had crowned the unfortunate Harold (*d*). In conformity with his original pretensions, he assumed the title of "King of the English," and entered into the usual compact with the nation in the ancient coronation oath.

William elected and crowned king of the English.

Theoretically a constitutional king.

William evidently began with the intention of reigning as the appointed heir of Edward and the lawful successor of the English kings. In that character he was obliged to respect the laws and customs of the kingdom. Theoretically he continued to govern as a constitutional king, though

(*d*) Will. Pictav., Gesta Willelmi (ed. Maseres), p. 145; Flor. Wigorn., an. 1066.

practically in defiance of everything but his own wishes.

Continuity of the constitution.

The continuity of the English constitution was not broken by the Norman conquest. That event ought to be regarded, not as a fresh starting-point, but as "the great turning-point" in the history of the English nation. "The laws, with a few changes in detail, remained the same; the language of public documents remained the same." The powers of king and witan remained constitutionally the same under William as under Edgar (*e*).

The Norman race.

The infusion of Norman blood has been considered extensive enough to count as one of the four chief elements of the present English nation; but it was still only an infusion. In the course of little more than a century it became absorbed, as the smaller Celtic and larger Danish elements had been absorbed previously, in the predominant English nationality. The fusion was doubtless facilitated by the common Teutonic descent of the two peoples (*f*). The Normans were in fact Northmen, who, instead of coming direct from Scandinavia, had sojourned for a century and a half in a French home. While retaining much of the Norse character, they had acquired, during the interval, the language and civilisation of the romanised Gauls and Franks, developing in the process a brilliant nationality distinct alike from the nationality of their origin and of their new home. The conquerors, moreover, were by no means utter strangers to the people whom they subdued. The vicinity of so remarkable a nation as the Normans had early begun to produce an influence upon the public mind of England, and had to some extent prepared the way for their ultimate supremacy. "Before the Conquest, English princes received their education in Normandy. English sees and English estates were bestowed on Normans. The French of Normandy was familiarly spoken in the palace of Westminster. The court of Rouen seems to have been to the court of Edward the Confessor what the court of Versailles long afterwards was to the court of Charles the Second" (*g*).

(*e*) See Freeman, Norm. Conq., i. 72.
(*f*) *Supra*, p. 2.
(*g*) Macaulay, Hist. Eng., i. 12 [ed. 1861].

Effects of the conquest.

The immediate changes which the conquest introduced were undoubtedly great, but they were practical rather than formal. The power of the crown was vastly increased. As the government became more centralised, local self-government, the essential characteristic of our Teutonic constitution, was for a time depressed; but only to arise again later on, when the nobles and people became united against the tyranny of the crown. The social aspect of England was enormously changed. The old dynasty had been supplanted by an alien family. The old aristocracy was superseded by a new nobility (*h*). The old offices received new names -the ealdorman, or earl, became the *comes*, the sheriff the *vice-comes*; and with the new names and alien officials, the old laws, though retained, and even promulgated anew, must have been considerably modified in practical administration (*i*).

Feudalism

The most important result of the conquest, in its constitutional aspect, was the assimilation of all the institutions of the country, from the highest to the lowest, to the feudal type. This was a consequence of the immense confiscations of landed estates which, occurring not all at once, but from time to time, ultimately placed King William in the position of supreme landowner, and established the feudal system in England.

Its gradual establishment.

The steps by which this great change was brought about, and the nature of the system of tenure thus established, demand some consideration.

At first the Conqueror (*k*), with an appearance of strict legality, appropriated merely the extensive royal domains

(*h*) [*Cf.* H. Taylor, Engl. Const., ii. cap. i. "The Norman Duchy and its Dukes," and Sir Francis Palgrave, Hist. of Normandy and England, vol. ii., for a sketch of the great Norman Duchy.—Ed.]

(*i*) Freeman, Norm. Conq., i. 4; [Gneist, Hist. Engl. Const., cap. viii., entitled "Property Bases of the Norman Feudal State," and the rich citations of the sources and literature of the period given in the notes on pp. 95, 96.—Ed.]

(*k*) It is perhaps scarcely necessary to remark that the term "Conqueror" did not in the language of the time of which we are treating imply subjugation, but signified merely one who "had sought and obtained his right." In reality, however, the modern meaning of the term more accurately describes William's practical position, which was, as he himself once expressed it, "king by the edge of the sword."

["Gulielmus i. conquestor dicitur, qui Angliam conquisivit, *i.e.*, acquisivit

—the *folkland*, now finally changed into *terra regis*—and the large forfeited estates of the Godwin family and all of those who had, or were suspected of having, taken up arms against him. Reserving to himself as the demesne of the crown more than 1400 large manors scattered over various counties, he divided the rest among his companions in arms. Although William affected to regard all Englishmen as more or less tainted with treason and liable to forfeiture of their estates, inasmuch as they had either fought against him or failed to range themselves on his side, yet the bulk of the landowners were at first suffered to retain their possessions. But there is reason to believe that this was subject to the condition of accepting a regrant from the Conqueror; the more important personages, in return for their adhesion, receiving back their estates as a free gift, the smaller owners on payment of a money consideration (*l*). By this means William procured a peaceable acknowledgment of his title over extensive districts into which his arms had not yet penetrated.

The English redeem their lands.

During the Conqueror's first absence from England a reaction set in after the panic; and the oppression and insolence of the Normans, Odo of Bayeux and William FitzOsbern, who had been left in charge of the kingdom as justices regent, excited the natives to rebel. One rising was no sooner suppressed than others broke out in different parts of the kingdom, and the first four years of his reign were occupied by William in acquiring the actual sovereignty of his new dominions. Each insurrection, as it occurred, was followed by a confiscation of the estates of those who in the eye of the law were rebels, however patriotic and morally justifiable may have been the motives by which they were actuated. Thus, by a gradual process and with an outward show of legality, nearly all the lands of the kingdom came into the hands of the king, and were by him granted out to his Norman nobles, to be held by the feudal tenure, to which they were alone accustomed in

Insurrections, followed by confiscation.

(acquired by right) non quod subigit." Spelman, Glossary. On the subject of Feudalism, *cf.* Maitland, Const. Hist., pp. 23, 24 and 141-64; also Round, Feudal England, pp. 247 *seq.*—Ed.]

(*l*) The contemporary Peterborough chronicler speaks of all who did homage to William at or soon after his coronation as buying their land.

their own country. The maxim of later times, "Tout fuit en lui et vient de lui al commencement" (*m*), seems to have been something more than a fiction. At the time of the domesday survey there still remained some few exceptions to the general feudal tenure, but before the accession of Henry I. all tenures seem to have become uniformly feudal (*n*).

Continental feudalism.

At the period of the Norman conquest, feudalism in both tenure and government was fully established in France, the country of its historic development, and in most of the continental countries of Europe (*o*). It had grown up gradually, deriving its elements partly from a Roman, partly from a Teutonic source. Indirectly and in part, it may be traced to the Roman system of usufructuary ownership and to the practice, under the Empire, of granting out frontier lands to the *limitanei milites*, to be held by military service: but its direct and principal sources were (1) the system of beneficiary grants which grew up under the Frank kings and emperors, working in combination with (2) the practice of personal commendation or vassalage, which seems to have superseded and absorbed the primitive and, in many respects, analogous German *comitatus*.

The machinery of government feudalised.

On the continent, feudalism had become much more than a mere system of tenure. It was inseparably bound up with the system of government and the legal and social

(*m*) Year book, 24 Edw. III. 65.

(*n*) Stubbs, Select Chart., Introductory Sketch, 14.

(*o*) [For recent views on the history of feudalism in France, see J. Flach, Les Origines de la France Ancienne, vol. i. See also the more recent works by an American historian, C. H. Haskins, The Normans in European History (Boston, 1915); Norman Institutions (Harvard Historical Studies, XXIV.) (London, 1918). The feudal system first developed itself in the Frankish monarchy, and formed for centuries the basis of the mediæval military system and of the Germanic state. *Cf.* Kremer, Das Langobardisch—Oestr.-Lehnsrecht (Wien, 1838). Raumer, Geschichte der Hohenstaufen (Leipzig, 1825), vol. v. p. 359, in a passage on the feudal system, says: "In every country of Europe, the feudal system shows certain distinct peculiarities, although the basis is one and the same, and one great principle pervades them all. It was more rapidly introduced into England than elsewhere; but there also its germs were already at hand, and would, alone, have gradually developed. In France most, yet not all, real estate was feudal, and local custom determined many incidents without there being any particular rule." See also Hallam, Middle Ages, i. 228, and Maitland, Const. Hist., pp. 141 *seq.*—ED.]

relations of the people. To the possession of a fief was united the right of local judicature. Originally tenable for life only, fiefs soon came to be hereditary (*p*). The practice of "sub-infeudation" naturally followed. The great feudatory who had received large grants of land from his sovereign retained a certain portion for his own demesne and then parcelled out the remainder amongst his own dependants, to be held by services similar to those which he himself owned. The provincial governors, who held the largest beneficiary estates, and in many cases were also extensive allodial proprietors, found themselves strong enough to establish a number of provincial principalities—*imperia in imperio*—in which, while admitting a nominal dependence on the sovereign, they claimed and exercised a practically independent military and civil jurisdiction. It was of the essence of a fief that its tenant owed fealty to his immediate lord and not to the State or the sovereign (*q*). The king might be the immediate lord; but in this case obedience was due to him, not in his political capacity as sovereign, but in his feudal capacity as lord. Thus during the height of the feudal system in France, the tenants of the immediate vassals of the crown never hesitated to follow their lord's standard against the king (*r*).

Sub-infeudation.

The general conversion of allodial into feudal tenure was also due, in a great degree, to the voluntary action of the smaller free proprietors, who, in an age of lawlessness and rapine, were glad to submit their persons and estates, by way of *commendation*, to some powerful neighbouring lord (*s*). Not only the possessions of laymen,

Commendation.

Feudal tenure of church lands.

(*p*) [Conrad, ii., seems to have been the first to declare sub-infeudation hereditary. Palgrave, i. 385, throws doubt upon the hereditability of the English fiefs down to King John. Gneist, Engl. Const., Hist., p. 99, note, claims for the hereditability of the fief that it was "never from the first seriously disputed."]

(*q*) Hallam, Middle Ages, i. 185.

(*r*) So late as the reign of St. Louis (1226-1270) it is laid down in his establishments, that a vassal to whom the king had refused justice might summon his own tenants, under penalty of forfeiting their fiefs, to assist him in obtaining redress by arms.—Etab. de St. Louis, c. 49; Hallam, Mid. Ages, i. 167.

(*s*) See Guizot, Essais sur l'Hist. de France, 166; Hallam, Mid. Ages, i. [316-320]. The practice of commendation had originally no connection with

but those of the church, became subject to the all-pervading feudal influence; the bishops and abbots, equally with the feudal nobles amidst whom they lived, swearing fealty for their lands to the king or other superior, and exercising feudal jurisdiction and authority over their own vassals (*t*).

Growth of feudalism in England.

In England an indigenous growth of feudalism had been going on, but its development had been slower and more purely Teutonic than on the continent, where the legal principles and practices of Imperial Rome exercised an accelerating influence. As a *system*, feudalism cannot be said to have been established in England prior to the conquest, but all its elements had long existed, both separately and sometimes in combination. The two chief elements of feudalism are: (1) The personal relation of lord and vassal founded on contract, and binding the parties to mutual fidelity, the one owning protection, the other service. (2) The holding of the usufruct (*dominium utile*) of land on the condition of rendering military service, the ultimate property (*dominium directum*) remaining in the lord, the grantor. Combined, these two elements constitute feudalism; apart, neither is sufficient. In the personal relation which existed between the Teutonic *princeps* and his *comites*, between the English hlaford and thegn, we have the first element of feudalism in its integrity. We have seen how universal the practice of commendation became, in so much that the lordless man was soon looked upon as an anomaly in the state and treated as an outlaw (*u*). One of the most natural modes in which the hlaford would reward his followers would be by a grant of land, subject to the condition of service, military service more especially. By the beginning of the eleventh century the king seems to have assumed the right of disposing of the folkland without the consent of the witan, and of granting it out to his followers as a reward for past, a retainer for future services. Moreover, by

Its chief elements.

land, but created a merely personal tie of mutual protection and fidelity, similar to the Roman *clientela*.

(*t*) Hallam, Mid. Ages, i. 194.

(*u*) *Supra*, p. 23.

means of sub-infeudation and commendation (*w*), a very large part of the land of England had come to be held by a feudal tenure, in contradistinction from allodial ownership, which remained the privilege of the few (*x*). But up to this stage feudality had affected only the tenure of land. The policy initiated by Cnut and continued under Edward the Confessor, of dividing the country among a few great earls, who in some cases succeeded in transmitting their jurisdictions to their children, carried the feudal tendency a step farther: and but for the Norman conquest would probably have resulted in the development of a feudalism almost identical with that which existed on the continent (*y*).

Difference between English and continental feudalism.

Both in the kingdom of France and in his duchy of Normandy, William had been familiar with the evils of feudalism, as there established. His recollection of contests with his own barons was too keen and too recent not to induce him to prevent, if possible, a recurrence of the struggle in his newly-acquired kingdom. From the very first he took measures to check the natural development of feudalism in England; and although by gradually substituting the Frankish system of land tenure for the complicated system which had grown up in England, he may be said to have established the feudal system, it was as a system of tenure only, not of government organisation.

Feudal tenure of land without feudal principles of government.

He was determined to reign as the king of the nation, not merely as feudal lord. While, therefore, availing himself

(*w*) The practice of commending a man's person and lands in order to obtain protection against violent aggression, appears to have been common in England as well as on the continent.

(*x*) The "dependent," remarks Stubbs, "might be connected with the king (1) by service, (2) by comitatus, (3) by commendation, (4) by reception of land as a benefice. Frank feudalism grew out of the two latter, the English nobility of service from the first two. . . . The feudalism that followed the Conquest was Frank and territorial, that which preceded it grew from personal and legal, not from territorial influences." Const. Hist., i. 170 n.

(*y*) ["By the coming of William two kindred systems of land tenure, both tending in the same direction, and yet in different stages of development, were brought into the closest contact, and out of the fusion between the two has arisen the feudal mode of holding land embedded in the English common law."—H. Taylor, Engl. Const., i. p. 238. *Cf.* Digby, Law of Real Property, p. 33; but on this point, and for an exhaustive survey of the French, Norman, and English sources of law, see the treatise by Brunner, in von Holtzendorff's Encyclopädie der Rechtswissenschaft, ii. 4.]

of all the advantages of the feudal system, he broke into its "most essential attribute, the exclusive dependence of a vassal upon his lord" (*z*), by requiring, in accordance with the old English practice, that all landowners, mesne tenants, as well as tenants-in-chief, should take the oath of fealty to the king (*a*). This was formerly decreed at the celebrated gemot held on Salisbury Plain, on August 1, 1086, at which the witan and all the landowners of substance in England, whose vassals soever they were, attended, to the number, it is reported, of 60,000. The statute, as soon as passed, was carried into immediate effect, and all the landowners (*landsittende men*) became "this man's men," and "swore him oaths of allegiance that they would against all men be faithful to him" (*b*).

Domesday survey.

This national act of homage and allegiance to the king, which, far from marking the formal acceptance of feudalism, as some have contended, was, in reality, anti-feudal, followed immediately upon the compilation of the domesday survey, which had been decreed in the memorable mid-winter gemot of Gloucester, 1085-1086. The recently attempted invasion from Denmark seems to have impressed the king with the desirability of an accurate knowledge of his resources, military and fiscal, both of which were based upon the land. The survey was completed in the remarkably short space of a single year. In each shire the commissioners made their enquiries by the oaths of the sheriffs, the barons and their Norman retainers, the parish priests, the reeves and six ceorls of each township. The result of their labours was a minute description of all the lands of the kingdom, with the exception of the four northern counties of Northumberland, Cumberland, Westmoreland, and Durham and part of what is now Lancashire. It enumerates the tenants-in-chief, under-tenants, freeholders, villeins, and serfs,

(*z*) Hallam, Midd. Ages, ii. 315.

(*a*) The oath is mentioned in the laws of King Edmund (*circ.* A.D. 943): *De Sacramento Fidelitatis Rei Edmundo faciendo.* Thorpe, Anc. Laws and Inst.; Select. Chart., 36.

(*b*) Stat. Will. Conq. *Id.* p. 80. Ang.-Sax. Chron., *s. a.* 1086. [*Vide* Gneist, Verwaltung, vol. i. p. 116; and Gneist, Hist. Engl. Const. p. 102. —Ed.]

describes the nature and obligations of the tenures, the value in the time of King Edward, at the conquest, and at the date of the survey, and, which gives the key to the whole enquiry, informs the king whether any advance in the valuation could be made (*c*).

Checks to the power of the feudatories.

In addition to his exactions of homage from his subtenants, William took other effective measures to keep the great feudatories in check. The lordships which he bestowed upon his principal barons were scattered over the kingdom, so that in no one district should the territories of one man be great enough to tempt him to rebellion (*d*). An unforeseen but very important result of this arrangement was the necessity under which the nobles found themselves of combining with one another, and ultimately of seeking the help of the people, in order to resist the royal power. "Thus the Old-English parliamentary

(*c*) The returns were transmitted to Winchester, digested, and recorded in two volumes which have descended to posterity under the name of Domesday Book. The name itself is probably derived from Domus Dei, the appellation of a chapel or vault of the cathedral at Winchester in which the survey was at first deposited. From this authentic record our most certain information is obtained as to the Old English common law, as it appears in the local customs referred to; the character of the municipal government and "consuetudines" of the towns; the financial system of the shires whilst still under the administration of the earls; and the general political and social condition of England towards the end of William's reign. [*Cf.* Chron. Petrib. and Gneist, Const. Hist., pp. 102 *seq.*; and particularly Lappenberg, Geschichte von England, i. pp. 143, 144. George III. caused this complete national register to be printed in two folio vols. in 1783; to these came four supplementary registers and indices in two additional vols. of the Record Commission. Sir Henry Ellis, who re-edited it in 1833, wrote a brilliant introduction, *q. v.* *Cf.* also Freeman, Norm. Conq., vol. 5, cap. 22. "The origin and meaning of the name Domesday or Domesday Book cannot," says the late editor, Mr. Carmichael, "yet be said to be free from doubt. Stow gives the 'Domus Dei' explanation, while the author of the Dialogus de Scaccario propounds the 'Dies Judicii' theory. It is certain, that the name was applied to several similar records, as we have notices of the Domesday of St. Paul's, the Domesday of Chester, the Domesday of York, &c.;" but *cf.* the *Dooms* of Alfred (*supra*, p. 41) for a possible derivation, and Maitland, Domesday Book and Beyond (publ. Selden Society). —Ed.]

(*d*) From Domesday we learn that the vast possession of the king's brothers, Odo, Bishop of Bayeux, and Robert, Count of Mortain, were scattered over seventeen and nineteen counties respectively. Etudes the steward (dapifer) held fiefs in twelve counties. Hugh (Lupus) of Avranches held lands in twenty-one counties, exclusive of those in his palatine earldom of Chester. See Thorpe's Lappenberg's England under the Normans, p. 201.

instincts which the Conquest for a while checked were again awakened and strengthened" (*e*). William abolished the great earldoms which had threatened the integrity of the kingdom under Edward, and, reverting to the earlier English practice, restricted the jurisdiction of the earl to a single shire. The government of the shire—judicial, military, and financial — was, moreover, practically executed by the sheriff, who was directly responsible to the king. An apparent exception to the general policy pursued by the Conqueror occurs in the creation of the three Palatine counties of Chester, Durham, and Kent. The extraordinary powers thus conferred were, however, requisite for the defence of the kingdom against attacks from Wales, Scotland, and the continent respectively, and two of the persons entrusted with them were ecclesiastics, who could not become the founders of families. A further check to the power of the baronage resulted from the maintenance in full vigour of the popular courts of the shire and the hundred, by which the private manorial jurisdictions of the nobles were restrained, as far as possible, within narrow limits.

Great earldoms abolished.

Counties Palatine.

The political and social influence of the system of feudal tenure gradually established in England under the Conqueror and his son Rufus has been so vast and so enduring, that it is desirable to take a glance at its outline, in order to a right understanding of the development of our constitution and laws. The feudal tenures were, indeed, abolished by Act of parliament in the reign of Charles II., but the spirit of the system still lives on. It stands revealed in the theory of our law that "all the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king" (*f*); in the law of primogeniture, as applied to the inheritance of real estate; and in the custom of family settlements, by which the old law of entail is practically continued.

Feudal tenures.

Prior to the conquest all lands had been subject to the *trinoda necessitas*. This obligation still continued. But after the feudal system of tenure had been fully established,

Obligations.

(*e*) Freeman, Norm. Conq., iv. 71.
(*f*) Coke upon Littleton, cap. i. sec. i.

all lands were held subject to certain additional obligations, which were due either to the king (not as sovereign, but as feudal lord) from the original grantees, called tenants-in-chief (*tenantes in capite*), or to the tenants-in-chief themselves from their under-tenants (*g*). Of these obligations the most honourable was that of *knight-service*. This was the tenure by which the king granted out fiefs to his followers, and by which they in turn provided for their own military retainers. The lands of the bishops and dignified ecclesiastics, and of most of the religious foundations, were also held by this tenure. A few exceptions only were made in favour of lands which had been immemorially held in *frankalmoign*, or free-alms (*h*).

Investiture. On the grant of a fief, the tenant was publicly invested with the land by a symbolical or actual delivery, termed

Homage. *livery of seisin*. He then did *homage*, so called from the words used in the ceremony: "Je deveigne votre *homme*." Humbly kneeling before his lord, with sword ungirt and head uncovered, he placed his hands between those of his lord, and pronounced the words: "I become your man from this day forward, of life and limb, and of earthly worship; and unto you shall be true and faithful, and bear to you faith for the tenements I claim to hold of you" (*i*). The lord then kissed his vassal on the cheek

Fealty. and received the oath of fealty. In the case of a sub-tenant (vavassor), his oath of fealty was guarded by a reservation of the faith due to his sovereign lord the king. For every portion of land of the annual value of £20, which constituted a knight's fee, the tenant was bound, whenever required, to render the services of a knight properly armed and accoutred, to serve in the field forty days at his own expense. In addition to service in war-time, the tenants-

(*g*) The tenants-in-chief, including the ecclesiastical corporations, enumerated in Domesday, amounted to about fifteen hundred. The under-tenants were about eight thousand in number, and largely consisted of the ousted English owners, who had been reduced from the degree of thegn to the condition of simple freeholders or franklins, holding under a Norman lord.

(*h*) [*Cf.* Jenks, Modern Land Law (Oxford, 1899), p. 14; and *infra*, p. 60, sub. "Grand Serjeanty."—Ed.]

(*i*) Littleton (*temp.* Edw. IV.), lib. i. c. 10, s. 85. *Cf.* Glanvill (*temp.* Hen. II.), lib. ix. c. 1.

in-chief were also bound to attend the king's court at the three great festivals of the year; and on the same principle every mesne lord having two or more freehold tenants had a right to compel their attendance (termed suit of court, from *suivre*, to follow) at the court-baron of the manor, as the lordship of pre-Norman times was now termed (*k*).

Incidents of tenure by knight-service :

Tenure by knight-service was also subject to several other incidents of a burdensome character, the unfair and oppressive exactions of which by the Norman and earlier Angevin kings supplied one of the chief incentives to the barons who wrested the Great Charter from King John. These incidental burdens were :—

Aids.

(1) The tenant was at first expected, and afterwards obliged to render to his immediate lord certain contributions termed *aids*. These, which were to be reasonable in amount, were due on three special occasions—to ransom the lord's person from captivity; to make his eldest son a knight; and to provide a suitable portion for his eldest daughter on her marriage (*l*). The Stat. of Westminster I. (3 Edw. I.) fixed the reasonable aid at 20s. for every knight's fee, and for every £20 value of land in socage.

Relief and Primer Seisin.

(2) On the death of the tenant, his fief descended to his heir, sons being preferred to daughters, and the elder to the younger son. But before taking up his ancestor's estate, the heir, if of age, had to pay a fine called a *relief*, which closely resembled and was apparently a feudalised form of the ancient English heriot (*m*). By demanding arbitrary and exorbitant reliefs the Norman kings, William Rufus especially, often obliged the heir in effect to purchase or *redeem* his lands. This abuse was

(*k*) Gilbert, Tenures, pp. 431 *et seq.* "The name 'manor' is of Norman origin, but the estate to which it was given existed in its essential character long before the conquest; it received a new name, as the shire also did, but neither the one nor the other was created by this change. The local jurisdictions of the thegns who had grants of sac and soc, or who exercised judicial functions amongst their free neighbours, were identical with the manorial jurisdictions of the new owners."—Stubbs, Const. Hist., i. 296. [For "manorial jurisdiction," see Maitland, Select Pleas of Manorial Courts (Selden Society's publication).—Ed.]

(*l*) Glanvill, lib. ix. c. 8; Magna Carta, c. 12 (*infra*. ch. iv.).

(*m*) Stubbs, Const. Hist., ii. 284.

specially provided against in the charter of Henry I., in which the king promised to exact, and required his tenants to exact from their under-tenants, only the accustomed and legal reliefs (*n*). Glanvill, in the reign of Henry II., tells us that the reasonable relief for a knight's fee was 100s., but that the sum due for a barony varied *juxta voluntatem et misericordiam domini regis* (*o*). The amount was not finally fixed till Magna Carta defined the *antiquum relevium* as £100 for a barony, 100s. for a knight's fee (*p*).

Tenants-in-chief were subject to a kind of additional relief, termed *primer seisin*, which consisted in the right of the king, on the death of one of his tenants leaving an heir of full age, to receive one year's profits of the inherited land (*q*).

Wardship. (3) If the heir were under age, the lord was entitled, under the name of *wardship*, to the custody of his body and lands, without any account of the profits. At the age of twenty-one in males, and sixteen in females, the wards were entitled to *ousterlemain* or "sue out their livery"—that is, to require delivery of their lands out of their guardians' hands, on payment of half a year's profits in lieu of all reliefs and primer seisins (*r*).

Marriage. (4) The lord also possessed the right of disposing of his female wards in marriage. The rejection by the ward of

(*n*) Chart. Hen. I.; Thorpe, Anc. Laws and Inst., 215.

(*o*) Glanvill, lib. ix. c. 4.

(*p*) *Infra*, ch. iv.

(*q*) Coke upon Littleton, 77A. It was by analogy to the feudal incident of primer seisin, that the popes—who, in carrying out Hildebrand's ideas, claimed to be feudal lords of the lands of the Church—subsequently exacted from every beneficed clergyman in England the *first-fruits* of his benefice.

(*r*) Wardship and marriage, the most oppressive of feudal exactions, seem not to have been ordinary feudal incidents, but nearly peculiar to Normandy and England (Hallam, Mid. Ages, i. 178). From the charter of Henry I. (*infra*, p. 73) it would appear that, so far as they were sources of pecuniary advantage, they were not claimed even in England under William the Conqueror, but were among the novel exactions introduced by William Rufus. Though abolished by Henry I., they were soon re-introduced. The Assize of Northampton, c. 4 (A.D. 1176), expressly gave the wardship of lands to the lord. The feudal lawyers justified the right of wardship on the ground: as to land, that the infant heir being incapable of rendering the military service, ought not to hold the fief; as to the person of the heir, that it was the interest of the lord to educate him properly for military service. *Cf.* Fortescue, De Laudibus Leg. Angl., p. 105.

a suitable match incurred the forfeiture of a sum of money equal to the value of the marriage—that is, as much as the suitor was willing to pay down to the lord as the price of the alliance. If the ward presumed to marry without the lord's consent, she forfeited double the market value of the marriage. This right, which applied not only to female wards, but to daughters who were the presumptive heirs of living vassals, was originally intended as a security against the lord being obliged to receive the homage of a hostile or otherwise objectionable tenant (*s*); but it was afterwards, without any feudal justification, extended to male wards, and used as a lucrative source of extortion both by the crown and mesne lords (*t*).

Fines on alienation.

(5) The right of devising land by will ceased (with a few local exceptions) at the conquest, and for some time afterwards the freedom of alienation *inter vivos*, which had existed in Anglo-Saxon times, seems to have been limited by certain restrictions in favour of the heir (*u*). Indirectly, however, alienation of portions of fiefs was effected through the medium of sub-infeudation, a process which by the time of Henry II. had been most extensively applied throughout the country (*w*). By this time also the ancestor appears to have acquired a limited right to defeat the expectation of his heir (*x*). Subsequently, by the statute of *Quia Emptores* (18 Edw. I. c. 1), sub-infeudation was forbidden, and every freeman was allowed to aliene his land at pleasure (except by will), to be held not of the alienor, but of the lord of whom the alienor had immediately held. All tenants-in-chief, however, still

(*s*) Glanvill, lib. vii. c. 12.

(*t*) Glanvill, lib. vii. c. 12; Stat. of Merton, 20 Hen. III. c. 6. Glanvill (*temp.* Hen. II.) expressly limits the lord's right of marriage to female wards. Bracton (*temp.* Hen. III.) extends it to both, "sive sit masculus, sive fœmina." The extension of the right to males was based on a strained and iniquitous construction of the word "haeredes" in Magna Carta (*infra*, ch. iv.). By the Statute of Merton the lord's right of selling the ward in marriage, or else receiving the value of it, is expressly declared.

(*u*) In a fief granted to a man and his heirs, "the ancestor and his heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed or could lawfully dispose of the direct or absolute dominion of the property."—Coke upon Littleton, 191A, n. (i.) vi. 5.

(*w*) Report of Lords Committee on the Dignity of a Peer, 1819, p. 107.

(*x*) Glanvill, lib. vii. c. i.

required a licence from the king before they could aliene, for which a fine was of course demanded. By a statute of Edward III. (*y*) the necessity for a licence was done away with, and tenants-in-chief were allowed to aliene at will, on payment of a reasonable fine to the king.

Escheat and forfeiture.

(6) Lastly, there was the valuable right of *escheat*, by which, on the determination of the tenant's estate—either on failure of legal heirs (*propter defectum sanguinis*), or on conviction of the actual tenant of felony or treason (*propter delictum tenentis*)—the fief reverted to the lord by whom or by whose ancestors it had been originally granted. Independently of escheat, the lands of a convicted felon were also liable to *forfeiture* to the crown (which intercepted the escheat to the mesne lord)—in the case of treason, for ever; in other felonies for a year and a day (*z*).

Tenure by grand serjeanty.

Besides the tenure by knight-service properly so-called, there was a species of tenancy in chief by *grand serjeanty* (*per magnum servitium*), whereby the tenant was bound, instead of serving the king generally in his wars, to do some special service in his own proper person, as to carry the king's banner or lance, or to be his champion, butler, or other officer at his coronation (*a*). This was, in fact, merely a continuation of the system which, as we have seen, was early developed in England through the growth of the thegnhood (*b*), and was of the same nature as the fiefs of office so general on the continent (*c*).

Petit serjeanty.

Grants of land were also made by the king to his inferior followers and personal attendants, to be held by meaner services. Among the tenants-in-chief mentioned in Domesday occur the names of the king's foresters, huntsmen, falconers, farriers, cooks, and similar officers. Hence, probably, arose tenure by *petit serjeanty*, though later on we find that term restricted to tenure *in capite*

(*y*) 1 Edw. III. c. 12.
(*z*) Wright, Tenures, 44, 120. See Magna Carta, c. 32, *infra*, ch. iv.
(*a*) Coke upon Littleton, i. 153.
(*b*) *Supra*, p. 23.
(*c*) The Count of Anjou, under Louis VI., claimed the office of Great Seneschal of France; *i.e.*, to carry dishes to the king's table on state days.—Hallam, Mid. Ages, i. 180.

by the service of rendering yearly some implement of war to the king (*d*). It was, in fact, merely a dignified species of the tenure in socage, which has next to be noticed.

Tenure in free socage.

Tenure in *free socage* (*e*) (which still subsists under the modern denomination of freehold, and may be regarded as the representative of the primitive allodial ownership) denotes, in its most general and extensive signification, a tenure by any certain and determinate service, as to pay a fixed money rent, or to plough the lord's land for a fixed number of days in the year. In this sense it is constantly opposed, by our ancient legal writers, to tenure by knight-service, where the service, though esteemed more honourable, was precarious and uncertain (*f*). Not being held by military service, socage tenure lacked one of the essential elements of a feud, but the spirit of feudalism was all-embracing and affected every tenure and every institution. Thus we find that tenure in socage, like that by knight-service, was created by words of pure donation accompanied by livery of seisin, and was liable to the obligation of fealty invariably, sometimes of homage; and was in like manner subject, but in a modified form, to many of the incidents of tenure by knight-service. Though considered less honourable than the latter, socage was practically much more beneficial, especially in its freedom from the grievous burdens of feudal wardship and marriage (*g*).

Besides petit serjeanty, socage tenure comprised two other particular species, burgage and gavelkind.

Burgage.

Tenure in *burgage* was a kind of town socage (*h*). It applied to tenements in any ancient borough, held by the

(*d*) Coke upon Littleton, ss. 159, 160. "Per servitium reddendi nobis cultellos, vel sagittas, vel hujusmodi." Magna Carta, c. 37, *infra*, ch. iv.

(*e*) *Socage*, from *soca*—a franchise or jurisdiction.

(*f*) Bracton, lib. 2, c. 16, s. 9; Fleta, lib. 3, c. 14, s. 9. [See Maitland, Const. Hist. (ed. Fisher), p. 150.—Ed.]

(*g*) The wardship and marriage of an infant tenant of a socage estate (up to the age of fourteen, when wardship ceased) devolved upon his nearest relation not being one to whom the inheritance could descend. Conversely to the rule in knight-service, the guardian in socage was strictly accountable for the rents and profits; and if he allowed his ward to marry under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though nothing had been received for it, unless he had married him to advantage. Stephen, Commentaries (16th ed., 1914), i. 127.

(*h*) [*Cf.* Gneist. Hist. Engl. Const., p. 434. Stubbs, i. 445, and note.—Ed.]

burgesses, of the king or other lord, by fixed rents or services (*i*). At the conquest the cities and boroughs were retained by the king as part of the demesne of the crown, but a large number were subsequently granted out to his barons. This tenure, which still subsists, is subject to a variety of local customs, the most remarkable of which is that of *borough-English*, by which the burgage tenement descends to the youngest instead of to the eldest son (*k*).

Gavelkind.

Gavelkind (*l*) is almost confined to the county of Kent, whose inhabitants are said to have secured this and other privileges by special favour of the Conqueror (*m*). The lands are held by suit of court and fealty, a service in its nature certain (*n*). The tenant in gavelkind retained many of the properties of allodial ownership: his lands were devisable by will; in case of intestacy, they descended to all his sons equally; they were not liable to escheat for felony, the maxim being "the father to the bough, the son to the plough"; and they could be aliened by the tenant at the age of fifteen.

Tenure in villeinage.

Below free socage was the tenure in *villeinage*, by which the agricultural labourers, both free and servile, held the land which was to them in lieu of money wages. The terms of the tenancy varied with the local customs of different manors, but it was always more or less precarious. Bracton, writing under Henry III., describes two kinds of tenure in villeinage, pure and privileged. Pure villeinage, he tells us, was the tenure by which the demesne

(*i*) Coke upon Litt., ss. 162, 163.

(*k*) Littleton, s. 165; Third Real Property Report, p. 8. [The manor of Kennington, it is believed, affords an instance of the survival of borough-English.—Ed.]

(*l*) Gavelkind, A.-S. *gafolcund*="rent-yielding" land, *gafol*="rent" or "customarie paiment of woorkes." Lambarde, Perambulation of Kent [ed. 1826, p. 477]; Kemble, Int. Dipl. i. lxi.

(*m*) [Digby, Hist. Law of Real Property, p. 46, n. 3, remarks that before the conquest, gafolcund or gavelkind lands meant simply "rent-paying" lands and as to the survival of this and other customs, says, "How it was that these customs survived is a question of great difficulty."—Ed. "Only where numerous old Saxon owners of the soil dwelt close together, as was the case in Kent, an equal division of the land amongst all the sons (gavelkind) remained a local custom."—Gneist, Const. Hist. Engl., p. 138. Kentish Town, a suburb of London, owes its name to this custom, which prevailed there.—Ed.]

(*n*) Wright, Tenures, 211.

of mesne lords was held by tenants who, whether free or slave, were bound to do whatever work was set them, and who "knew not in the evening what was to be done in the morning." They were occupiers of the land at the lord's will. Privileged villeinage, or villein socage, was the tenure by which tenants of the king's demesnes held their land on condition of performing base services, but certain, and who could not be removed from the land as long as they were willing and able to perform the service due. It was this kind of "privileged villeins," or "villein socmen," who were properly termed "glebæ ascriptitii" (*o*).

The Conqueror's policy national rather than feudal.

Whilst availing himself of every advantage which his position as feudal lord paramount gave him over his baronage, William was careful to maintain his rights, and, as a rule, endeavoured to perform his duties as king of the English, "preferring the forms of ancient royalty to the more ostentatious position of a feudal conqueror" (*p*).

National witan continued.

He continued to hold, three times a year, at the accustomed times and places, the ancient National Assembly, at which the archbishops and bishops, abbots and earls, thegns and knights attended (*q*). There is some evidence that it even retained for a time its old constitutional name of witan (*r*). But as the feudal principle gradually acquired predominating influence in every department of the state, the National Council almost insensibly changed from the assembly of the Wise Men into the Curia Regis, the court of the king's feudal vassals. William made but few changes in the national laws. It was their administration by foreign officials which constituted the grievance most heavily felt. In the fourth year of his reign, when the work of conquest had been completed, he ordained that peace and security should be observed between his English and Norman subjects, and renewed the law of Edward the Confessor, with certain additions made by himself "ad utilitatem populi

William's laws.

He renews the law of Edward the Confessor.

(*o*) Bracton, lib. iv. c. 28. On the personal status of the villeins and the nature of the tenure by which they held their lands, see *infra*, pp. 273 *seq.*

(*p*) Stubbs, Const. Hist. i. 314.

(*q*) A.-Sax. Chron., *s. a.* 1087.

(*r*) A.-Sax. Chron., *s. a.* 1086, *supra*, p. 52.

Anglorum" (*s*). In like manner Cnut, fifty-two years before, had reconciled the English and Danes at a gemot at Oxford, and renewed the law of Edgar the Peaceful (*t*). This renewal by William is the first mention of the famous laws of King Edward, which Normans as well as English soon learnt to demand in every reign, until Magna Carta supplied them with a more substantial foundation for their liberties. By the "laws of Edward" they probably meant not the laws which he had promulgated but which he had observed (*u*). The phrase imported a demand for a mild and good government as opposed to harsh and unjust innovations. But before confirming the English laws, William took measures to ascertain what they were. He directed that in each county twelve representative men- "Anglos nobiles et sapientes et suâ lege eruditos"- should be elected to report to him on oath the laws and customs of the English (*w*).

Wager of battle.

Normans and English were, in theory, equal before the law; but the distinction of personal law was, for some purposes, allowed. The Normans were accustomed to the wager of battle (*x*), the English to the ordeal and compurgation. King William allowed the man of each race to be tried by the customs of his own country. But *Francigenæ* (who would be mostly Normans), settled in

(*s*) Statutes of Will. Conq.; Sel. Chart., 81.

(*t*) Flor. Wigorn., *s. a.* 1018.

(*u*) The remark is William of Malmesbury's; Hallam, Middle Ages, ii. 325.

(*w*) Hoveden, Chronica, ii. 218, *s. a.* 1070.

(*x*) "The trial by battle, which on clearer evidence seems to have been brought in by the Normans, is a relic of old Teutonic jurisprudence, the absence of which from the Anglo-Saxon courts is far more curious than its introduction from abroad."—Stubbs, Const. Hist., i. 299. [*Cf.* particularly Brunner, Die Entstehung der Schwurgerichte. "Long after the jury had . . . worked its way to a position of supremacy in both civil and criminal causes, some of its older rivals lived on in neglect and obscurity until finally abolished by statute. As late as 1818, in the case of *Ashford* v. *Thornton* (Barn. & Ald. 457), the judges held, after solemn argument, that trial by battle in appeals of murder was still a part of English criminal procedure; this decision led to its abolition in the following year."—Taylor, English Const., p. 332. "Probably the last case in which it was employed was that of *King* v. *Williams*, 2 B. & C. 538. Wager of law was abolished by 3 & 4 Will. IV. cap. 42, s. 13. *Cf.* Stephen, Hist. Crim. Law, vol. i., p. 244, note 2." See G. Neilson, Trial by Combat (Glasgow, 1891). *Cf.* also *post*, chap. iv., text note to Magna Carta, sec. 54.—Ed.]

England previously to the conquest, were to be treated as Englishmen (*y*).

The English frequently revenged themselves on their local tyrants by assassination. To check this, William ordained that the whole hundred, within whose limits a Norman should be secretly slain, should be liable to a heavy amercement (*z*). In connection with this enactment there grew up the famous law of "Englishry," by which every murdered man was presumed to be a Norman, unless proofs of "Englishry" were made by the four nearest relatives of the deceased (*a*). "Presentments of Englishry," as they were technically termed, are recorded in the reign of Richard I. (*b*), but not later. Even so early as the reign of Henry II., we are told that the two races (with the exception of the villeins) had become so blended, through inter-marriages, that the distinction between Norman and Englishman had almost entirely disappeared (*c*).

Public peace maintained.

The public peace which William established and maintained was the greatest benefit of his reign. He permitted no rapine but his own. Meting out stern justice to Norman and Englishman alike, he yet abolished the punishment of death, and substituted what was possibly regarded as the milder punishment of mutilation (*d*). He also, like his predecessors Ethelred and Cnut, prohibited the infamous practice of selling men into foreign slavery (*e*).

The forest laws.

The love of field sports amounted in the Conqueror to an ungovernable passion. "He loved the tall deer," says the Anglo-Saxon Chronicler, "as if he were their father"; and the laying waste of 17,000 acres for the formation of the New Forest, in Hampshire, made a deep impression

(*y*) Statutes of Will. Conq.; Select Chart., 80, 81.

(*z*) Statutes of Will. Conq.; Dialogus de Scaccario, lib. i. c. 10; Select Chart., 80, 193.

(*a*) Bracton, lib. 3, tr. 2, c. 15, s. 7. The crime of murder (*murdrum*) was anciently restricted to *secret* killing. Dial. de Scac. lib. i. c. 10. [On *Murdrum*, *cf.* Maitland, Pleas of the Crown, Glouc. (Introd. xxix.)]

(*b*) Abbrev. Placit., pp. 13, 17, 18, 19.

(*c*) *Cf.* Dial. de Scac., lib. i. c. 10; Select Chart., 193.

(*d*) Statutes of Will. Conq.; Select Chart., 81.

(*e*) *Ibid.* [s. 9.]

on the popular mind. The forest laws which William introduced, though not so cruel as they subsequently became under Henry I., were yet marked by extraordinary harshness.

The penalty for killing a hart or hind was loss of sight. The killing of even wild boars and hares was forbidden. The beginning of forest laws is traceable to the legislation of Cnut; but by him the right of every man to hunt on his own ground was expressly recognised (*f*). Up to the period of the conquest, hunting was still regarded not merely as a pastime but as a means of exterminating noxious animals and of procuring food. Under William it became a mere sport for pleasure, and the exclusive privilege of the king and those whom he allowed to share it (*g*). Though mitigated under Henry III. and in succeeding reigns, yet "from this root," says Blackstone, "afterwards sprung a bastard slip known by the name of the game law,"—a system which, down to the reign of William IV., made it illegal for any man to take or sell game, even on his own land, unless possessed of a real property qualification of at least £100 a year (*h*).

The church.

Previous to the conquest the English church had enjoyed what has been termed "an insular and barbaric independence." The conquest brought it into much closer connection with Rome (*i*). Foreign ecclesiastics were substituted in high places for the native clergy. But while the church lost some of its national independence, it gained in power. As secular government gained in force through the strong centralisation system of the Conqueror, so the power of the church increased through its more complete subordination to the papacy. The Conqueror, however, had no intention of admitting the interference of the Pope in the English church or state to a greater extent than he himself might judge to be expedient. He was, indeed, under great obligations to the papacy, and was at all

(*f*) Cnut, Secular Dooms, c. 81.
(*g*) See Freeman, Norm. Conq., vol. iv. [610].
(*h*) Stephen, Commentaries (16th ed. 1914), iv. 421.
(*i*) [*Cf.* Gneist, Const. Hist., chap. 15; Taylor, Engl. Const., pp. 259 *seq.*; Freeman, Norm. Conq., iv. 220; J. A. Giles, Lanfranci Opera (Oxford, 1844), vol. i., pp. 19 *seq.*—Ed.]

times regarded as a favoured son of the church. But he resolutely refused to admit the haughty pretensions of Hildebrand, who in the prosecution of his scheme of ecclesiastical feudalism, in which all kings of the earth were to hold their kingdoms as fiefs of the Holy See, called upon William to do fealty for the crown of England (*k*). Under the pre-Norman kings the church and the state had been practically identical, alike subject to the supreme power of the witan, by whom kings, earls, and bishops were elected and deposed, and laws spiritual and temporal were enacted. The bishop and the ealdorman sat side by side at the gemot of the shire or hundred, deciding all causes, ecclesiastical as well as civil. One of the most important acts of William's reign was the separation of the ecclesiastical from the civil jurisdiction of the courts of law. He directed that from henceforth no bishop or archdeacon should hold pleas of ecclesiastical matters in the shire or hundred court; but that all such pleas should be determined according to the canon and ecclesiastical laws before the bishop, at the place which he should appoint for the purpose. All sheriffs and other lay persons were prohibited from interfering in spiritual causes (*l*). But in making this change William took care to preserve the ancient supremacy of the state, by laying down his three famous canons of the royal supremacy, viz.:

Separation of spiritual from temporal courts.

(1) That no pope should be acknowledged, or papal letters received, in England, without the king's consent.

(2) That the decrees of national synods should not be binding without the king's confirmation.

(3) That the king's barons and officers should not be excommunicated, or constrained by any penalty of ecclesiastical rigour, without his permission (*m*).

William's canons of the royal supremacy.

(*k*) Epp. Lanfr. ed. Giles, No. 10.

(*l*) See the Ordinance of William in Ancient Laws and Institutes, ed. Thorpe, p. 213, and Select Chart., 81.

(*m*) Eadmer, Hist. Nov., i. p. 6; Select Chart., 79. "A further usage, which was claimed by Henry I. as a precedent, was the prohibition of the exercise of legatine power in England, or even of the legates landing on the soil of the kingdom without royal licence." Of these rules, Stubbs remarks: "There is something Karolingian in their simplicity, and possibly they may have been suggested by the germinating Gallicanism of the day. They are, however, of great prospective importance, and form the basis of that ancient customary law on which throughout the Middle Ages the

A further check on the dignitaries of the church consisted in the tenure of their estates; which from having been held by allodial title, or in frankalmoign (free alms), were for the most part converted into baronies to be held of the king by military service.

Judicial organisation.

The judicial organisation of the kingdom at the end of William's reign was but slightly altered from what it had been under Edward the Confessor. The spiritual courts had now, as we have seen, exclusive jurisdiction in spiritual matters; but for civil matters the ordinary courts were still those of the shire, the hundred, or the borough, together with the hall-moots, now become the manorial courts-baron of the king or other lord. In the court of the shire all the freeholders of the shire (*n*), in the court baron all the free tenants of the manor (*o*), continued, as of old, to act as judges, and doubtless gave judgment in accordance with the ancient local customs; but in the shire and hundred courts the Norman sheriff, or *vice-comes*, now presided with a power and authority far less limited than the power and authority of any of his English predecessors.

Curia Regis.

The supreme court of the kingdom was the Curia Regis, at once the council of the king and the witenagemot of the nation, with whose counsel and consent the king discharged both legislative and judicial functions. The immense amount of business to be transacted, the frequent absence of the king in Normandy, and his ignorance of the English language, caused the appointment of a new officer of the highest dignity, the justiciar, who represented the king in all matters, acted as regent in his absence, and at all times administered the legal and financial business of the country. The office of chancellor, who, as official keeper of the royal seal, first appears under Edward the

Justiciar.

English Church relied in her struggles with the papacy."—Const. Hist., i. 311.

(*n*) See the accounts of the suits between the Bishop of Rochester and Pichot, the sheriff on behalf of the king. Text. Roffens. 150; between Bishop Wulstan and Abbot Walter of Vesband [Evesham], "judicante et testificante omni vice-comitatu." Heming, Chartulari, p. 77; and between Archbishop Lanfranc and Odo, Bishop of Bayeux, Text. Roff. (Hickes), p. 32.

(*o*) Coke, Fourth Inst., 46, 268; Co. Litt., 58; Spence, Eq. Juris., i. 100. In Domesday mention is made of one lord lending another some free tenants to make up his court, *propter placita sua tenenda*.

Confessor (the first of our kings who had a seal), was continued: but he was subordinate to the justiciar, heading the king's clerks or chaplains, who performed the duties of secretaries.

William was reputed to be the most opulent prince in Christendom. His daily income is circumstantially stated by Ordericus Vitalis to have been £1,061 10s. 1½d., a sum which seems incredible when tested by the relative value of money then and now. Little trust can be placed in the numerical statements of early chroniclers; but there is no doubt that the Conqueror's revenue was exceptionally large, whilst his expenditure was relatively small. His armies were furnished free of cost by his military tenants, and by the old constitutional *fyrd* or national militia. When he thought fit to employ mercenaries, their cost was defrayed by a danegeld levied on the whole cultivated land of the kingdom, and by billeting the troops at free quarters throughout the country (*p*). William's riches.

As king of the English, feudal superior of his tenants-in-chief, and personal lord of all his subjects, William exercised a power far greater than that which any of his predecessors had ever wielded. Though the formal changes which he had made in our constitution and laws were few in number, his government was practically despotic and his administrations harsh. His tyranny, says Hallam, "displayed less of passion or insolence than of that indifference about human suffering which distinguishes a cold and far-sighted statesman" (*q*). It was in this spirit that to resist a threatened invasion from Denmark he caused the whole country between the Tyne and the Humber to be laid waste, so that for some years afterwards there was not an inhabited village and hardly an inhabitant left (*r*). His rule.

The reign of the Conqueror was on the whole beneficial to the nation, which required welding together and organising by means of a strong central government; and he

(*p*) This was three times the rate of the old danegeld, which, after having been abolished by Edward the Confessor, was now revived in an aggravated form and continued as a permanent, though only occasional, source of revenue. *Cf.* Freeman, Norm. Conq., iv. 685; Stubbs, Const. Hist., i. 302.

(*q*) Middle Ages, ii. [302].

(*r*) Will. Malmesb., Gesta Regum, lib. iii., s. 249.

himself was both a wise and, from his own standpoint, a just king (*s*). But his stern nature and the hardness of his rule made him an object of fear to all ranks of his subjects. In the picturesque language of the Anglo-Saxon chronicler: "He was a very stark man and very savage; so that no man durst do anything against his will. He had earls in his bonds who had done against his will; bishops he set off their bishoprics, abbots off their abbotries, and thegns in prison, and at last he did not spare his own brother Odo." "Truly in his time men had mickle suffering and very many hardships. Castles he caused to be wrought and poor men to be oppressed. He was so very stark. He took from his subjects many marks of gold and many hundred pounds of silver: and that he took, some by right and some by mickle might, for every little need." "He let his lands to fine as dear as he could: then came some other and bade more than the first had given, and the king let it to him who had bade more. Then came a third and bid yet more, and the king let it into the hands of the man who bade the most. Nor did he reck how sinfully his reeves got money of poor men, or how many unlawful things they did. As man spake more of right law, so man did more unlaw. His rich men moaned and his poor men murmured: but he was so hard that he recked not the hatred of them all" (*t*).

(*s*) Gregory VII. in his Epistles (Ep. vii. 33), calls William "gemma principum," and extols his love of justice. [Ep. iv. 18.]

(*t*) Ang.-Sax. Chron., pp. 189-191.

[*Cf.* Digby, Hist. Law of Real Property, 1884; and Lappenberg, Geschichte von England (1837), vol. ii., p. 160.—Ed.]

CHAPTER III.

THE NORMAN AND FIRST ANGEVIN KINGS.

William Rufus, A.D.	1087-1100.	*Henry II.* A.D.	1154-1189.
Henry I.	1100-1135.	*Richard I.*	1189-1199.
Stephen	1135-1154.		

WILLIAM RUFUS. 1087-1100.

THE constitutional importance of the reign of William Rufus consists mainly: (1) in the systematic elaboration by Ranulf Flambard of the theory of the incidents of feudal tenure, and its rigid application in practice, as a fiscal expedient, to ecclesiastical and lay tenants alike; and (2) in the continued struggle between the royal and feudal powers, which caused the king to throw himself upon the support of the native English, and led to the ultimate breaking up of the baronage of the conquest. A despot of the worst sort, William devoted himself almost entirely to his pleasures, and after the death of Archbishop Lanfranc, his ablest adviser, left nearly all the work of government to his justiciar. This great official was not, as in the Conqueror's days, a powerful baron, but a humble and clever court chaplain, of congenial and compliant tastes, Ranulf Flambard (*a*), by whom the church, the feudal vassals, and the people, were all subjected to systematic oppression and extortion. As justiciar, he controlled and directed the whole fiscal and judicial business of the kingdom; and in order to supply the prodigality of the master who had raised him to this exalted position, he directed his ingenuity,

Ranulf Flambard.

(*a*) Ranulf is by some said to have come over to England prior to the Conquest, being supposed to be the Ranulf who occurs in Domesday, i. 51, as a small landowner in Hampshire, T. R. E. He was afterwards, perhaps, in the service of Maurice, Bishop of London; and then chaplain to William Rufus, who after a time made him chief justiciar. (Ord. Vital., x. 18; Ang. Sac. i. 706.) [*Vide* Lappenberg, Norman Kings, p. 226; Ord. Vital., 786 c.; Will. of Malmesbury, iv. 314.—ED.]

like Empson and Dudley four centuries later (*b*), to turning the feudal rights of the king and the procedure of the courts of justice into instruments of pecuniary extortion. The feudal incidents of relief, wardship, and marriage, which under the Conqueror had been based on true feudal principles, and, for the most part, reasonably exacted, were now systematically organised as a method of arbitrarily taxing the tenants-in-chief, under colour of exacting a legal due (*c*). The system of extortion thus fixed upon the tenants of the king was naturally, indeed necessarily, extended by them to their sub-tenants, and in this way all holders of land by military tenure became subject to the new imposts (*cc*). The fiefs of the church were assimilated by Ranulf as far as possible to lay fiefs. Bishoprics and abbeys were purposely kept vacant for years together, during which time the king claimed, on the analogy of the wardship of a lay fief, to receive all the profits for his own use; and when at length a successor was nominated to the vacant benefice, a fine was demanded equivalent at least to the relief which would have been payable by a lay heir (*d*).

Struggle between the royal and feudal powers, 1073.

The great struggle between the royal and feudal powers, which began under the Conqueror himself in the conspiracy of Ralph [de] Guador, Earl of Norfolk or East Anglia, and Roger of Breteuil, Earl of Hereford, was actively carried on under Rufus. Taking advantage of the claim of Duke Robert to the throne of England, the larger part of the barons eagerly seized the opportunity of siding with him against the king. Seven years later an attempt was made to set aside the line of the Conqueror altogether in favour of Stephen of Aumale, grandson of Duke Robert II. of Normandy. On both occasions the insurrections were unsuccessful; and being followed by considerable forfeitures, served only to bring about the decay, ultimately the almost utter extinction, of the baronage of the conquest (*e*). In

Rebellion of the barons.

William II. seeks the support of the English.

(*b*) *Infra*, ch. x.

(*c*) *Supra*, pp. 59, 60.

(*cc*) The mesne tenant had a legal right to the assistance of his sub-tenants to meet the feudal claims of the lord paramount. Glanvill, lib. ix. c. 8.

(*d*) Ord. Vital., viii. 8: "He desired to be the heir of every one, churchman or layman." Ang.-Sax. Chron., *s. a.* 1100; Stubbs, Const. Hist., i. 325.

(*e*) Stubbs, Const. Hist., i. 321.

order to maintain his ground, the king was compelled to court the support of his English subjects, who eagerly and successfully fought for him against their feudal oppressors. On three separate occasions—at his coronation, at the outbreak of the rebellion of his Norman barons almost immediately afterwards, and again in 1093, when ill and in fear of death—he sought to engage the affections of the people by issuing constitutional manifestos in which he promised good laws, lighter taxation, and free hunting (*f*). But his promises were never kept. Instead of the free hunting promised, he made the capture of a stag a capital offence (*g*).

HENRY I. Charter of Liberties.

Henry I., on his accession, issued a Charter of Liberties which is in form an amplification of the covenant made by the king with his people in the coronation oath. Copies were despatched to the several counties and deposited in the principal monasteries. In this charter Henry endeavoured to propitiate all classes of his subjects by abolishing the *mala consuetudines*, the illegal exactions with which the clergy, the baronage, and the people generally had been oppressed during the reign of the late king. (1) To the church he promised that on the death of an archbishop, bishop, or abbot, he would neither sell nor let to farm the possessions of the church or its tenants, nor accept any, during the vacancy of the benefice. (2) To his barons and other tenants-in-chief he promised a remission of various illegal exactions, to which they had been subjected under cover of the incidents of feudal tenure. The heir should not be compelled to *redeem* his land, as in the time of the late king, William Rufus, but should pay only lawful and just relief. The king's licence for the marriage of his vassal's daughter or other female relative must still be obtained, but it should be given without payment, and should not be refused unless the intended husband were the king's enemy. In the case of an heiress the king would take the advice of his baronage before giving her in marriage. Widows should not be given in marriage against their will. Widows without children

(1) The church.

(2) The vassals.

Reliefs.

Marriages.

Dower.

(*f*) Will. Malmesb., Gesta Regum, lib. iv. § 306; Eadmer, Hist. Nov., i., pp. 14, 16.

(*g*) Will. Malmesb., Gesta Regum, iv. § 319.

should possess their dowers unconditionally; if with children, so long as they continued chaste.

Wardships. The wardship of the persons and lands of children should belong to the mother or other relation.

Demesne of military tenants. Knights, holding by military service, should have their demesne lands free from all *gilda* and *opera*, in order that they might the more efficiently equip themselves for the defence of the king and kingdom.

Testaments. Intestacy. The right of the king's vassals to bequeath their personal property by will was recognised; and in case of intestacy, the deceased person's wife, children, relations, or vassals legally authorised, were to dispose of it for the good of his soul, as to them should seem good.

Fines. Fines for offences should not be assessed at the king's mercy, as in the time of his father and brother, but according to the nature of the offence, as in the time of the king's "other ancestors." Thus early had the Norman barons begun to claim for themselves the benefit of the old English laws.

(3) The nation. (3) To the nation at large the king granted the laws of Edward the Confessor with the emendations made by the Conqueror with the consent of his barons (*h*). The claims of the people were also recognised in the proclamation of the king's peace, and especially in the express extension to all under-tenants of the benefits granted to the king's immediate vassals. The king further promised to exact no moneyage which had not been levied in the time of King Edward, and to punish all coiners or utterers of base money. He forgave the debts due to his late brother; and all murder-fines (*murdra*) up to the day of his coronation. Such fines should in future be regulated by the law of King Edward (*i*).

Forests retained. The only unpopular clause in the charter was that in which Henry declared his intention to retain the forests in his own hand as his father had held them, a personal indulgence for which he pleads the "common consent" of his barons.

(*h*) Cap. 13.

(*i*) See the Charter in full in Ancient Laws and Institutes, p. 215, and Select Chart., 96.

Importance of Henry's charter.

This Charter of Liberties is the sole legislative enactment of Henry's reign; for the so-called "Laws of Henry I." were compiled at a later date (*k*). Historically, the charter records the nature and recent introduction of the illegal exactions which it specifically abolishes; constitutionally, it is important as a formal and deliberate recognition, by a practically despotic king, of the ancient and lawful freedom of the nation, and of the limitation of the royal power. It seems to have been re-issued by Henry at various times; but as soon as he found himself firmly seated on the throne, he never hesitated to disregard its provisions. It was renewed by Stephen and by Henry II.; and under John it served, in the hands of the archbishop, Stephen Langton, as a text upon which the barons founded their claim for a restoration of the ancient liberties of the nation.

Henry courts support of the native English.

His somewhat questionable title to the throne, the contest with his brother Robert, and the difficulty of keeping in check a turbulent and powerful baronage, caused Henry to court the alliance and support of the native population. The people were already predisposed in his favour as being the first of the new dynasty who had been born and educated in England. His politic marriage with the "good Queen Maud," daughter of Malcolm Canmore, king of Scots, by Margaret, sister of Edgar Atheling, gave him still stronger claim to national support. Moreover, the feudal barons, ever seeking to achieve their independence, were the common enemies of both king and people. Impelled alike by national sentiment and unity of interest, and encouraged by the king's promises of good government, the people steadily supported the crown against all assailants. Henry was thus enabled to obtain a complete

(*k*) The so-called *Leges Henrici Primi* are "a collection of legal memoranda and records of customs, illustrated by reference to the civil and canon laws, but containing very many vestiges of ancient English jurisprudence. The date of the compilation is later than the reign of Henry I." . . . "It would appear to give probable but not authoritative illustrations of the amount of national custom existing in the country in the first half of the eleventh century, but cannot be appealed to with any confidence, except where it is borne out by other testimony."—Stubbs, Select Chart., 100. [For an exhaustive list of pleas of the crown under the *Leges Henrici Primi*, see Liebermann, Gesetze der Angelsachsen, vol. i., p. 556. –Ed.]

Triumphs over the rebellious barons.

triumph over his rebellious vassals, many of the most powerful of whom, including Robert de Belesme, Earl of Shrewsbury and Arundel, the most dangerous of them all, were expelled the kingdom with the forfeiture of their English estates (*l*). In the end Henry acquired a plenitude of royal power equal, if not superior, to that which the Conqueror had enjoyed. In the redistribution of the forfeited lands and jurisdictions he carried out his father's policy of keeping within moderate limits the possessions of any one vassal. As a further check to the still formidable nobility of the conquest he raised to the baronage a number of new men, whom he placed on an equality with the proudest of their fellow barons (*m*).

Strengthens jurisdiction of county and hundred courts.

During the late reign the feudal nobles appear to have extended their hereditary franchises to the detriment of the national courts of the shire and the hundred. Henry restored the jurisdiction of these courts to its ancient vigour by ordering that they should be held at the same places and during the same terms as in the time of King Edward. All suits respecting lands between tenants-in-chief of the crown were to be determined in the king's court, but, like suits between vassals of different mesne lords, were to be heard in the county court (*n*). The proper jurisdiction of the baronial court over the disputes of two or more tenants of the same lord was not interfered with.

Charters to boroughs.

The king also granted charters to several boroughs confirming and augmenting their ancient privileges. His charter to the citizens of London is remarkable for the amount of municipal independence and self-government which it accorded. But London had always held an exceptional position; and its privileges were far in advance

(*l*) *Cf.* Ordericus Vitalis, Eccl. Hist., xi. 3.

(*m*) Ord. Vit., Eccl. Hist., xi. c. 2; Select Chart., 94.

(*n*) See the charter in Rymer, i. 12, and in Select Chart., 99. The address, "Henricus Rex Anglorum Samsoni episcopo et Ursoni de Abetot et omnibus baronibus suis Francis et Anglis de Wirecestrescira salutem," is remarkable for two reasons: (1) the bishop of the diocese is joined with the sheriff, in the ancient form, notwithstanding the separation of the spiritual and temporal jurisdictions decreed by the Conqueror; (2) English *barons* are mentioned.

of those as yet granted to the other towns of the kingdom (*o*).

Royal administration centralised and systematised.

At the same time that Henry strengthened the local courts of the shire, the hundred, and the borough, as a check to the feudal nobility from below, he endeavoured to curb them from above by centralising and systematising the royal administration. Roger, Bishop of Salisbury, having served as chancellor from 1101 to 1103, was appointed in 1107 chief justiciar. Under his direction, during his thirty-two years' tenure of this high office, the administration of the Curia Regis was organised for judicial and financial purposes. A regular routine of business was established. The annual courts were still held *de more*, during the great festivals, at Gloucester, Winchester, and Westminster; but as these were found inadequate for the increasing business of the nation, the chief justiciar, accompanied by some of the other justices of the king's court, began, towards the end of Henry's reign, to make occasional circuits (*p*) round the kingdom, principally for fiscal but partly also for judicial purposes. The local courts were thus brought into closer connection with the supreme national tribunal. By introducing order and system into the administration of law and government, Henry prepared the way for the important reforms which the reign of his grandson will present to our notice.

Occasional circuits of the justices.

Severe penalties.

The severity with which Henry punished offences against the laws caused him to be popularly regarded as the

(*o*) *Cf.* the charter to London with those to Beverley and Newcastle-on-Tyne.—Select Chart., 102-108.

(*p*) [Towards the close of the reign of William Rufus, in 1096, we find two itinerant commissioners, Bishop Walkelin and Flambard, despatched to Exeter and to Cornwall to hold royal pleas (*Cf.* Placita Anglo-Norm., p. 69). It is probable that no practice of the kind had as yet been established, and that this journey was on some special business. Gneist, Const. Hist. Engl., p. 223, remarks: "The administration of the counties by the vice-comites had from the first suffered from grave abuses. For this reason, even under Henry I. the vice-comites had begun to be relieved of certain judicial business by commissioners sent from the royal court," and refers to the Pipe Roll, 31 Henry I. (1131), as showing that at that date the commission of itinerant justices had become an institution. It is probable that their duties were originally financial, but sitting as they did in the Shire Courts, they gradually came to discharge judicial business also. *Cf.* Taylor, Engl. Const., pp. 316 *seq.*; and Stubbs, Const. Hist., vol. i., p. 423. Ed.]

"Lion of Justice" described in the prophecies of Merlin. William Rufus had reintroduced the punishment of death for offences against the forest laws; by Henry it was extended to ordinary crimes. In the year 1124 no less than forty-four thieves were hanged in Leicestershire at one time. "No man," says the Anglo-Saxon Chronicle, "durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold or silver, no man durst say to him aught but good" (*q*). By severe punishments he effectually checked the malpractices of the moneyers, which had caused a general depreciation of the coinage. He also checked the abuse of the royal right of purveyance by the officers of his court. But the expenses of his foreign wars and home administration necessitated the imposition of heavy and regular taxation, of which the contemporary chroniclers complain in bitter terms (*r*).

Question of investitures.

After the triumph of Henry over the feudal baronage, the only class in the state strong enough to offer any resistance to the royal power consisted of the clergy. The contest between the king and Archbishop Anselm on the question of investitures ended in a compromise. The ring and crosier, as denoting spiritual jurisdiction, were in future to be conferred by the pope; fealty and homage, being civil duties, were still to be rendered to the king, in return for the temporalities of the see. Thus the national church regained her spiritual freedom, which the rapid growth of the feudal principle had injuriously affected, and the king retained all that he could justly claim the supremacy in things temporal (*s*). The chief

(*q*) Ang.-Sax. Chron., *sub ann.* 1135; Select Chart., 95.

(*r*) Flor. Wigorn. *sub ann.* 1104. See also A.-Sax. Chron., *sub ann.* 1104, 1105, 1110, 1118, 1124.

(*s*) ["The cohesion of the national Church was for ages the substitute for the cohesion which the divided nation was unable otherwise to realise. . . It was to an extraordinary degree a national Church, national in its comprehensiveness as well as in its exclusiveness. . . . The ecclesiastical and the national spirit thus growing into one another supplied something at least of that strong passive power which the Norman despotism was unable to break." (Stubbs, Const. Hist., i. 266.) "What the Church," writes Gneist (Hist. Engl. Const., p. 193), "had lost, by its subjection to the feudal state, had been retrieved upon the ground of moral influence; for to its other callings a new one had been added. In the dissensions of nationalities it

constitutional importance of the struggle consists in the successful imposition of a limit to the royal power.

STEPHEN.

His first charter.

On his coronation, Stephen issued a charter briefly confirming, in general terms, to the barons and men of England all the liberties and good laws which his uncle Henry, King of the English, had granted them, as well as all the good laws and good customs which they possessed in the time of King Edward (*t*). After a short interval the king held his first Great Council at Oxford, at which most of the English, together with several Norman, prelates and barons attended. In this assembly a second charter was drawn up and promulgated by the king. It is more definite in form than the earlier one, and partakes more of the nature of a solemn compact between the king and the nation. It was attested by no less than thirty-seven witnesses, of whom fourteen were bishops (eleven English and three Norman), and the rest lay vassals, for the most part of high rank and official position.

His second charter, 1136.

Concessions.

As Stephen owed his election chiefly to the favour of the clergy, who were greatly influenced by his brother Henry, Bishop of Winchester, it is not surprising to find the greater part of the charter devoted to concessions to the church.

To the clergy.

(1) The king promised to repress all simony, and to maintain the jurisdiction of the bishops over all clerical persons and their possessions. Ecclesiastical dignities, with their privileges and ancient customs, should remain inviolate. The church should retain possession of all estates which it had enjoyed by an uncontested title at the death of the Conqueror, or which the liberality of the faithful had since then conferred. But if it should demand anything which it held or possessed prior to the death of the Conqueror, but had since lost, the king reserved to his indulgence and dispensation either to refuse or restore it. He renounced all claim to the property of deceased clergymen, whether dying testate or intestate: and ordered that every vacant see with its possessions

had become the natural mediator, the nearest protectress of the oppressed Saxon element, the sole power that the Norman kings at their court days were at times obliged to meet on the footing of negotiation."—ED.]

(*t*) Statutes of the Realm—Charter of Liberties, p. 4.

should be committed to the custody of the clergy, or other upright men of such see, until a pastor be appointed.

To the nation.

(2) To the people generally Stephen promised to maintain peace and justice in all things. All exactions and extortions, wickedly introduced by sheriffs or any other persons, he totally abolished; and promised to observe and cause to be observed good laws and the ancient and just customs in cases of *murdrum* and other pleas and suits.

The forests.

He reserved to himself the forests made and held by William his grandfather and William his uncle; but those added by King Henry he restored to the church and realm. All these things the king granted and confirmed, "saving his royal and just dignity"—a somewhat vague and elastic reservation (*u*).

Feudal anarchy.

During the tumult and anarchy of what can scarcely be termed the "reign" of Stephen, in which all central authority collapsed, the provisions of these charters fell into abeyance, together with the whole legal and administrative machinery. But they are important as forming another link in the chain by which the ancient liberties of the nation, symbolised in the popular mind by the laws of Edward the Confessor, were handed down in unbroken series to the framers of the Great Charter.

Brave, energetic, and personally popular, Stephen lacked administrative ability and the art of governing men. The barons, taking advantage of his weakness, fortified their castles, and, under colour of supporting either the king or the empress, made themselves practically independent of both. They claimed and exercised all the most obnoxious privileges of continental feudalism. "Quot domini castellorum," says the chronicler, "tot reges vel potius tyranni" (*w*). The king endeavoured to strengthen his position by creating new earldoms, supported by extravagant grants from the crown-lands and the exchequer. The only result was to impoverish himself and arouse the jealousy of the old nobility. His justifiable but impolitic violence towards the three bishops, Roger of Salisbury and his nephews, Nigel of Ely and Alexander of Lincoln,

Creation of new earls.

Arrest of the bishops, June 24, 1139.

(*u*) *Ibid.* p. 3.
(*w*) Will. Newb., Hist. Angl., l. i. 22.

secured, indeed, the surrender of their castles, but alienated the entire body of the clergy, who had been the king's chief supporters, and threw into confusion the whole administration of the government, over which Bishop Roger, as justiciar, had hitherto continued to preside (*x*). Even the king's brother, Henry of Winchester, went over to the side of the empress. During the long period of civil war the condition of the people was most lamentable. Both sides employed mercenary troops, principally from Flanders, who behaved with the greatest insolence and barbarity. "In this king's time," says the Anglo-Saxon chronicler, "was all dissension and evil and rapine. . . . Never yet was there more wretchedness in the land" (*y*).

Peace of Wallingford, 1153.

At length, in 1153, after the death of Stephen's eldest son Eustace, a pacification was brought about at Wallingford, through the mediation of the bishops (*z*). It was agreed between the king and young Henry, Matilda's son, now in his twenty-first year, and ratified by the assent and homage of the bishops and barons on both sides, that Henry should give up his claim to the present possession of the throne, and should be acknowledged as the rightful successor on the death of Stephen.

Scheme of reform.

As a part of the pacification a comprehensive scheme of reform was drawn up, to be carried out by both Stephen and Henry, for the restoration of good government and national prosperity. It included the resumption by the king of the royal rights which had been usurped by the barons; the restoration to the lawful owners of the estates of which they had been deprived by intruders; the razing of the "adulterine," or unlicensed castles; the restoration of agriculture by means of a system of state subventions to the impoverished farmers; the maintenance of the rights of the clergy; the revival of the sheriffs' jurisdiction, and the appointment of impartial men to that office; the

(*x*) "The arrest of Bishop Roger was perhaps the most important constitutional event that had taken place since the Conquest; the whole administration of the country ceased to work, and the whole power of the clergy was arrayed in opposition to the king. It was also the signal for the civil war, which lasted, with more or less activity, for fourteen years."—Stubbs, Const. Hist., i. 353.

(*y*) A.-Sax. Chron. (ed. Ingram), pp. 364, 367.

(*z*) Matt. Paris, *s. a.* 1153; Sel. Chart., 112.

disbandment of the armed forces; the banishment of the foreign mercenaries; the strict administration of justice: the encouragement of commerce; and a reform of the coinage (*a*).

In less than a year from the date of the treaty, the death of Stephen, on October 25, 1154, handed over the imperfectly accomplished work of restoring order and good government to Henry of Anjou (*b*).

HENRY II. Henry II. succeeded to the throne, pursuant to the treaty of Wallingford, without the faintest appearance of opposition. The regularity of his succession was doubtless facilitated by the great strength which his extensive continental possessions gave him (*c*). To the English people, moreover, he was welcome as a descendant of their ancient royal house; and throughout his reign they faithfully supported him in every emergency. But though claiming, through his mother, to be at once Norman and English, Henry was by birth and character neither Norman nor English (*d*). He was the founder of a new and foreign dynasty, the Angevin, or Plantagenet, as it was sub-

The Angevin dynasty.

(*a*) *Cf.* Stubbs, Const. Hist., i. 360. "The result was stated in the form of a treaty to settle the succession. Each of the parties had something to surrender and each something to secure."

(*b*) ["Whose statesmanlike activity, whose power of combining and adapting that which was useful in the old systems of government with that which was desirable and necessary under the new, gives to the policy which he initiated in England almost the character of a new creation."—Stubbs, Const. Hist., vol. i., p. 363.—ED.]

(*c*) From his father Henry had inherited Anjou and Touraine; in right of his mother he possessed Normandy and Maine, and with his wife Eleanor, who had been divorced from Louis VII. of France, he had received the seven provinces of Poitou, Saintonge, Auvergne, Périgord, Limousin, Angoumois, and Guienne. "A third part of France, almost the whole western coast from the borders of Picardy to the mountains of Navarre, acknowledged his authority; and the vassal who did homage to the sovereign for his dominions was in reality a more powerful prince than the king who received it."—Lingard, ii. 189. [*Cf.* also Stubbs, preface to Benedict of Peterborough, Rolls Series, Benedictus, vol. ii.; Freeman, Norm. Conq., vol. v., pp. 436-459.—ED.]

(*d*) See Freeman, Growth of Eng. Const., 72. "The peculiar position of Henry II. was something like that of the Emperor Charles V.—that of a prince ruling over a great number of distinct states without being nationally identified with any of them. Henry ruled over England, Normandy, and Aquitaine, but he was neither English, Norman, nor Gascon."—*Ibid.* 177.

sequently called (*e*), which was destined to rule over England for a period of more than three centuries (viz., 1154-1485). Henry himself endeavoured to rule England as an English king, and he was far too able and energetic ever to succumb to a favourite, foreign or native. But under his sons Richard and John, and his grandson Henry III., the evils of a foreign dynasty made themselves felt, and the descendants of both English and Norman alike experienced the bitterness of being governed by a set of foreign favourites, supported by the swords of foreign mercenaries.

Henry II. had the advantage of coming to the throne after a long civil war, during which the nation had become thoroughly weary of anarchy. At his coronation, or shortly afterwards, he issued a charter, briefly and in general terms granting and confirming to the church, and all earls and barons, and all his men, all the liberties and free customs granted by the charter of his grandfather, King Henry, and abolishing and remitting all the evil exactions which that king had abolished and remitted (*f*). Without any delay the young king set himself energetically to the task, which he persistently worked at throughout his reign, of establishing law and order upon a permanent basis (*g*). Taking as his immediate model the government of his grandfather, Henry I., he reconstructed the disorganised administrative and judicial machinery of the kingdom, but with developments and innovations which were the outcome of his own individual policy (*h*).

Charter of Liberties.

(*e*) "The Angevin family are commonly known as the Plantagenets; but the name was never used as a surname till the fifteenth century."—*Ibid.* 176.

(*f*) Statutes of the Realm—Charter of Liberties, p. 4.

(*g*) ["The reign of Henry II.," says Digby, Hist. Law of Real Prop., "is the starting-point of the history of modern English law, as well as of the modern English Constitution."]

(*h*) "Henry II. is the first of the three great kings who have left on the constitution indelible marks of their own individuality. . . . Each of the three sovereigns had a strong idiosyncrasy, and in each case the state of things on which he acted was such as to make the impression of personal character distinct and permanent."—Stubbs, Const. Hist., i. 483. ["The full scope of Henry's policy," remarks Taylor, Engl. Const., p. 284, "was not only to establish the reign of law, but to reduce all orders of men to a state of equality before the same system of law." *Cf.* also Gneist, Const. Hist. Engl., i., p. 222: "Henry II. seems from the first to have found the

Inquest of Sheriffs, 1170.

His determination to prevent peculation and other abuses in the administration of the royal officials is shown by his remarkable action in 1170, when in a Great Council at London he dismissed all the sheriffs of the kingdom, with their bailiffs, for alleged misconduct in their office. The dismissed functionaries were compelled to give pledges to answer, and make compensation for, all wrongful exactions proved against them, and a special commission was issued by the king with instructions to make in every county an exhaustive inquisition by the oaths of all the barons, knights, freeholders, and even the villeins of such county, into the receipts of the sheriff and of all persons in any way accountable to the exchequer (*i*).

Policy of Henry II.

The aim of his policy through life appears to have been the consolidation and centralisation of the kingly power in his own hands, and the rounding off, as it were, of his great empire, extending from the Cheviots to the Pyrenees. He attempted, though with only partial success, to reduce the Welsh to obedience; Ireland, unfortunately for herself only imperfectly conquered, was annexed to the English crown; and Scotland acknowledged his superiority.

Constitutional results of Henry's reign.

The two great constitutional results of Henry's reign were: (1) the reorganisation and full development of the kingship as a monarchy at once feudal and national; and (2) the maintenance of the legal supremacy of the state over the national church. In working out his policy, the king had to contend with two powerful opponents—(1) the feudal baronage, whose power and privileges it was necessary largely to curtail, and (2) the clergy, who, under the system of separate spiritual and temporal jurisdictions initiated by the Conqueror, had succeeded in obtaining a mischievous and even dangerous immunity from all the ordinary processes of law.

best security for the new throne in reforms affecting the administration of the realm, which, especially after the commencement of his conflict with the Church, are of a sweeping kind." See further, Pollock and Maitland, Hist. of Eng. Law, vol. i., pp. 118 *seq.*; and for a retrospect of the legal activity of this reign, Maitland, Const. Hist., pp. 10-14.—Ed.]

(*i*) Ben. Abb., i. 5. The comprehensive instructions to the Commissioners comprised in thirteen articles, are given in Sel. Chart. 141, from Bodl. MS., Rawlinson, C. 641.

Over the barons Henry was completely successful. The programme of administrative reform, which had been included in the terms of the pacification of Wallingford, was strictly carried out. The "adulterine" castles were destroyed; the new earldoms extinguished: the alienated demesnes of the crown resumed; the foreign mercenaries banished: the coinage was reformed (*k*). With the aid of counsellors whose ability he had the discernment to detect (*l*), he reorganised and extended the judicial and financial administration of the Curia Regis and exchequer. He renewed the provincial visitations of itinerant justices, increased their number and assigned them regular circuits. This diffusion of royal justice over the whole kingdom was a great step in its organisation. Another legal improvement in this reign was the institution of the Grand Assize, or trial by the recognition of a jury, which superseded the old modes of trial by battle and by compurgation (*m*). The principle of recognition by a jury was extended to all descriptions of business, fiscal and legal. In conjunction with the visits of the itinerant justices, it exercised a very important influence in training the people for self-government (*n*).

Administrative reforms.

Itinerant justices.

The Grand Assize.

By means of Henry's administrative reforms, not only did the mass of the people obtain the enjoyment of an orderly and legal security, but the feudal baronage, a source of danger to crown and people alike, were kept in

Order and security.

(*k*) Rob. de Monte, *s. a.* 1155. For the new coinage, *cf.* Ben. Abb., i. 263, *s. a.* 1180.

(*l*) Henry's first ministers were "the Earl of Leicester, Robert de Beaumont, Archbishop Theobald, who had been firmly attached to the interests of the empress throughout the later years of the struggle, Bishop Henry of Winchester, and Nigel of Ely, who represented the family and the official training of Roger of Salisbury, the Justiciar of Henry I. In a subordinate capacity was Thomas Becket of London, the pupil of Theobald and future archbishop and martyr, and Richard de Lucy, who had charge of the castle of Windsor and the Tower of London, at the peace, who had possibly acted as Justiciar during the last year of Stephen, and who filled the office for the first twenty-five years of Henry's reign."—Stubbs, Const. Hist., i. 486. De Lucy was succeeded as justiciar in 1180 by the great lawyer Ranulf de Glanvill.

(*m*) [See Taylor, Engl. Const., chap. iii., p. 291. Stubbs, Const. Hist., vol. i., p. 656, likens them to the capitularies of the Frank kings. -Ed.]

(*n*) For a more detailed consideration of Henry's legal and administrative reforms, see *infra*, ch. v.

strict subordination, and the executive power taken out of their hands. After the inquest of 1170, instead of bestowing the office of sheriff on the great barons, who had evinced a tendency to make it hereditary in their families, Henry gave it to lawyers and soldiers drawn from the ranks of the new official nobility. For the office of chief justiciar he selected the ablest laymen instead of ecclesiastics, thus curbing the power of both bishops and barons. The power of the latter was still further, and permanently, diminished by the institution, on the occasion of the Toulouse war, of a commutation of personal military service for the money payment termed scutage (*o*).

Scutage, 1159.

Power of crown increased.

Thus, in addition to the fiscal and judicial, the military administration of the kingdom was now concentrated in the king's hands. In a fiscal point of view the king was enabled, by means of scutage, to increase his revenue by bringing the lands of the dignified ecclesiastics under contribution. Politically it rendered him independent of the military aid of his barons in foreign warfare, in which their place was supplied by hired mercenaries. At home he rendered himself equally independent of the feudatories, by reviving in the Assize of Arms an ordinance issued in 1181, the ancient *fyrd*, or national militia (*p*).

Assize of Arms, 1181.

The effect of Henry's policy was greatly to augment the power of the crown. But while maintaining a strong central government he never aimed at despotic power. He appears to have been imbued with a sincere regard for constitutional government of the feudal type. He was continually calling his Great Council together. No public matter of importance was transacted, no law issued, without their consent and advice. And in this National Council all ranks of the landowners attended—archbishops, bishops, abbots, priors, earls, barons, knights, and free-

(*o*) Rob. de Monte, *s. a.* 1159; Gervas. Dorob. c. 1381; Select Chart., 122, 123. "A precedent was found in the ancient fyrdwite, the fine paid by the Anglo-Saxon warrior who failed to follow his king to the field. But instead of being a punishment it was now regarded as a privilege: those tenants of the Crown who did not choose to go to war paid a tax of two marks on the knight's fee."—Stubbs, Const. Hist., i. 494. [See also Pollock and Maitland, Hist. of English Law, vol. i., pp. 266-71, and Round, Feudal England, pp. 247 *seq.*—Ed.]

(*p*) Ben. Abb., i. 278; Hoveden, ii. 261; Select Chart., 127, 147.

holders. The form and much of the spirit of national representation were thus maintained.

Contest with Becket and the clergy.

In his contest with Becket and the clergy, Henry was only partially successful. But though obliged to submit to personal humiliation and a seeming defeat, the principle for which he had contended—the supremacy of the royal jurisdiction over clergy and laymen alike—was practically as well as theoretically vindicated.

Constitutions of Clarendon, 1164.

The celebrated Constitutions of Clarendon, sixteen in number, are in form a record and acknowledgment by the archbishops and bishops, in presence of the earls, barons, and other *proceres* of the kingdom, clerical and lay, of the customs ascertained by recognition to have regulated the relations of church and state in the time of Henry I. (*q*). The record is expressed as being made on account of the dissensions and discord which had arisen between the clergy and the king's justices and barons concerning the nature of these customs, and contains the distinct promise of the archbishops and bishops faithfully to observe them as therein defined.

The most important articles may be conveniently arranged in five groups.

Trial of clerks accused of crime.

(1) All clerks accused of any crime were to be summoned in the first instance before the king's justices, who should determine whether the cause ought to be tried in the secular or spiritual court. In the event of the cause being remitted to the spiritual court, a lay officer should be appointed by the king's justices to watch the proceedings; and the accused, if found guilty, should not be protected by the church (cap. iii.). All matters pertaining to the king's court should be terminated there; but causes

(*q*) ["They are no mere engine of tyranny, or secular spite against a churchman; they are really a part of a great scheme of administrative reform, by which the debatable ground between the spiritual and temporal powers can be brought within the reach of common justice, and the lawlessness arising from professional jealousies abolished."—Stubbs, Const. Hist. i., 503. "The sixteen articles of Clarendon comprise, in a formulated shape, the sovereign rights of the feudal state."—Gneist, Engl. Const., p. 197. "In this fresh understanding between Church and State, the distinction between temporal and spiritual courts established by the Conqueror was distinctly recognised."—Taylor, Engl. Const., p. 287; *cf.* also Freeman, Norman Conquest, v. 452; Bigelow, Hist of Procedure, p. 34.—Ed.]

which appeared to fall within the jurisdiction of the ecclesiastical courts should be sent thither to be dealt with (cap. vii.). The distinction between the civil and ecclesiastical jurisdictions introduced by William the Conqueror was thus maintained (*r*). But the king's court was first to decide the fact whether or not the accused was entitled to be tried in the spiritual court; the latter court then decided the fact of the guilt or innocence of such accused persons as were remitted to it; and the king's court sentenced and punished the guilty.

Suits as to advowsons and presentations.

All disputes concerning advowsons and presentations to livings, whether between laymen or clerks, or laymen and clerks, were to be dealt with and terminated in the king's court (cap. i.).

Pleas of debt.

The king's court should have jurisdiction over all pleas of debt, whether involving a question of good faith (of which the church claimed exclusive cognisance) or not (cap. xv.).

Suits between laymen and clerks as to land.

In disputes between laymen and clerks as to land, the chief justice should decide, by the recognition of twelve lawful men, whether it was held by feudal or eleemosynary tenure (frankalmoign), and should refer the suit accordingly, unless both parties agreed on the same judge, to the lay or ecclesiastical tribunal (cap. ix.).

Trials of laymen for spiritual offences.

Laymen tried in the bishop's court were to have the benefit of common law rules of evidence. If no one should be willing, or dare, to appear as accuser against a powerful delinquent, the sheriff, at the request of the bishop, should empanel and swear twelve lawful men of the vicinage to give true evidence (cap. vi.).

Excommunication of tenants-in-chief and officers of the king's household.

(2) No tenant-in-chief of the king or officer of his household should be excommunicated, nor his lands put under interdict, without the previous consent of the king, or, in his absence from the kingdom, of his justiciar (cap. vii.).

On the same principle, tenants of any of the king's cities, castles, boroughs, or demesne manors, refusing to appear when cited by the archdeacon or bishop to answer

(*r*) [Pearson, Hist. Eng. Early and Middle Ages (1867), i. 495, notes that "when William I. and Lanfranc concurred in a policy which dissolved the old union of the two bodies politic (Church and State), they had unavoidably placed them in a condition of suppressed antagonism."—Ed.]

for any wrong falling within his lawful jurisdiction, might be placed under interdict, but not excommunicated until application had first been made for the intervention of the king's chief local officer (cap. x.).

(3) The custody of vacant archbishopries, bishopries, abbeys, and priories of royal foundation, should be in the king's hand, and their revenues paid to him. King to have custody of vacant sees, etc.

Election of a new incumbent should take place, in obedience to the king's writ, by the chief clergy of the church, assembled in the king's chapel, with the assent of the king, and with the advice of such beneficed clergymen as the king might summon for the purpose. Mode of election to bishopries and abbacies.

Before consecration, the incumbent elect should do homage and fealty to the king as his liege lord, of life, limb, and earthly honour, saving the rights of his order (cap. xii.). Homage and fealty of incumbent elect.

Archbishops, bishops, and all the beneficed clergy of the kingdom, holding of the king *in capite*, should answer for their baronies to the king's justices and officers, and follow and observe all royal rights and customs; and, like the rest of the barons, ought to take part in the judgments of the king's court, except in cases involving loss of life or limb (cap. xi.). Baronial duties of the prelates, etc.

No archbishop, bishop, or beneficed clergyman should quit the realm without licence from the king. Those who were permitted to leave should give pledge, if required, not to contrive any hurt to the king or kingdom during their absence. Clergy not to quit the realm.

(4) Appeals ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop. If the archbishop failed to do justice, resort should be had, in the last instance, to the king, so that by his order the controversy might be terminated *in the archbishop's court* and not proceed farther (*i.e.*, to the pope), without the king's assent (cap. viii.). Ecclesiastical appeals.

(5) Lastly, the sons of villeins (*rusticorum*) were not to be admitted to orders without the assent of the lord on whose land they were born (cap. xvi.) (*s*). Ordination of villeins.

(*s*) See the Latin text of the Constitutions in Lyttelton, Life of Henry II iv. 182-185; and in Stubbs, Select Chart., 131-134.

This restriction on the ordination of villeins brings out the democratic element which, in a certain way, the church of the Middle Ages possessed. Not that the mediæval church was really democratic, for its system of government culminated in the papacy, and the papacy had become the keystone of a great arch of despotism. But it was only through the portals of the church that the low-born and landless man, however great his intellectual ability, could hope to attain to dignity and power. The intention of the king and barons, in this article of the Constitutions of Clarendon, probably went no farther than to protect the legal property which every feudal lord had in the service of his villeins. But its practical effect was undoubtedly still further to depress the lowest class of the population. A similar prohibition is contained in the Assize of Clarendon, issued by Henry in 1166; and more than two hundred years afterwards, in the fifteenth year of Richard II., we find the Commons House of Parliament petitioning that villeins might not be allowed to put their children to school in order to advance them by the church, "and this for the honour of the freemen of the kingdom." Under Richard II. it is not so much the feudal and proprietary as the anti-democratic and caste feeling which is manifested (*t*).

RICHARD I.

The reign of Richard I. belongs not so much to the history of England as to the history of Christendom. He was the "creation and impersonation of his own age" (*u*), and occupied the central place in the history of his times.

An absentee king.

With the exception of about four months immediately following his coronation, and the two months which he spent in England in 1194 after his release from captivity, Richard was absent from his kingdom during the whole ten years of his reign (*w*). By birth, education, and sympathies essentially a foreigner, he seems to have

(*t*) Rot. Parl. 15 Rich. II., 294; Hallam, Middle Ages, iii. 181. [See, *infra*, p. 273 *seq.*, on the subject of villeinage; and *cf.* Vinogradoff, Villainage in England.—Ed.]

(*u*) Stubbs, Itinerarium Ricardi Primi, Rolls Series [Int. xi.].

(*w*) [Gneist, Const. Hist., p. 240, says: "The absence of this knight-errant from English soil, which was, with the exception of a few months, continuous, proved extremely beneficial, in so far as it rendered the continuance of an organised internal government possible."—Ed.]

regarded England merely as an appanage to his continental possessions, and a profitable source of revenue. It was the strong administrative system, established under his father, by which the power of the crown was so largely augmented, that rendered it possible for Richard thus to govern as an absentee king. To support his expedition to Palestine, to pay his ransom from capitivity, and to carry on his wars in France, every known source of taxation was exhausted. Public offices and dignities were openly sold to the highest bidder: the demesne lands of the crown were first sold, and then, after a time, forcibly resumed; all the feudal dues, including the recently introduced scutage, were rigorously exacted: the old danegeld, under the thin disguise of a "carucage," was revived in a more stringent form: not only land, but personal property, which had for the first time been subjected to taxation in the Saladin tithe granted to Henry II. in 1188, was laid under a heavy impost: the gold and silver of the churches were seized; and the Cistercian monks compelled to compound for all their wool (*x*). These systematic and oppressive exactions appear to have been borne by the nation with remarkable patience. The rising of the populace of London, under William with the Beard, "quidam legis peritus," was not so much a resistance to taxation as to its unjust assessment, because the rich citizens "sparing their own purses, willed that the poor should pay the whole" (*y*). The only real opposition proceeded from the clergy. In 1198 the regular clergy refused to pay the carucage, or tax of five shillings imposed on each carucate (or hundred acres) of land. The king immediately issued a proclamation directing that on the one hand no layman should be liable to make satisfaction for an injury committed against a clerk, and, on the other, that every clerk injuring a layman should be forthwith compelled to give redress (*z*). This amounted to virtual outlawry, and the monastic

Excessive taxation.

Ways of raising money.

Popular rising.

Opposition of the clergy.

(*x*) Bened. Abb., ii. 90. For the various modes of taxation, see Rog. Hoveden, iii. 210, 240, *s. a.* 1193-1194; Select Chart., 243, 244, 246.

(*y*) Rog. Hoveden, iv. 5, *s. a.* 1196. The talliage was assessed as a poll-tax equally on all the citizens rich and poor. Fitz-Osbert wished it to be assessed in proportion to the property of each citizen.

(*z*) Rog. Hoveden, iv. 66; Select Chart., 250.

clergy were forced to submit. A more important and successful stand was made in the same year by the bishops Hugh of Lincoln and Herbert of Salisbury. In a council of the barons, summoned at Oxford by the justiciar, Archbishop Hubert Walter, to consider the king's demand for an aid of three hundred knights, each to receive three shillings a day, and to serve with him for a year against Philip of France, the two bishops alone had the courage to refuse; alleging that the lands of their sees were liable for military service within the kingdom only and not abroad (*a*). The opposition was successful; the king's demand was withdrawn; and shortly afterwards the justiciar resigned (*b*).

Administration of Richard's four successive justiciars.

During the all but continuous absence of Richard, the administration of the kingdom was carried on by four successive justiciars who acted as viceroys. (1) William Longchamp, Bishop of Ely, a Norman of servile birth, was both justiciar and chancellor. As a parvenu he excited the jealousy of the barons, and by his vigorous assertion of the royal rights raised up a strong opposition headed by Earl John, who was ever plotting against his brother's government. The struggle ended in the deposition of Longchamp from the justiciarship by a Great Council of the bishops, earls, and barons of England, and the citizens of London, assembled at St. Paul's by Earl John, and apparently acting in concert with William of Coutances, Archbishop of Rouen, whom the king had sent over from Messina some months previously with a secret appointment to the office of justiciar, to be produced only if circumstances should require it (*c*). This proceeding

(*a*) Vita Magna St. Hugonis, p. 248; Select Chart., 247.

(*b*) "This event is a landmark of constitutional history: for the second time a constitutional opposition to a royal demand for money is made, and made successfully. It would perhaps be too great an anticipation of modern usages to suppose that the resignation of the minister was caused by his defeat."—Stubbs, Const. Hist., i. 548. "The *first case* of any opposition to the king's will in the matter of taxation which is *recorded* in our national history" was the refusal of Becket to agree to Henry II.'s wishes with reference to the danegeld in 1163. This was the commencement of the quarrel between the king and the archbishop; and as "danegeld appears for the last time under that name in the accounts of the year," the opposition "would seem to have been, formally at least, successful."—*Ibid.* 463.

(*c*) Bened. Abb., ii. 213, *s. a.* 1191; Sel. Chart., 244.

has been characterised as "the earliest authority for a leading principle of our constitution, the responsibility of ministers to parliament (*d*). But this view seems to invest the action of the Council of St. Paul's with too great importance. It can at most be regarded as a rude anticipation, by an irregularly constituted assembly acting as if it represented the nation, of that constitutional control over ministers of the crown which the regular National Council was later on to claim and obtain. (2) The assembly which deposed Longchamp recognised the Archbishop of Rouen as his successor. At the close of the year 1193, the Archbishop of Rouen gave place to (3) Hubert Walter, Archbishop of Canterbury, and a nephew of the celebrated Ranulf de Glanvill: and on the resignation of Hubert Walter in 1198, (4) Geoffrey FitzPeter, Earl of Essex, the fourth and last of Richard's justiciars, entered into office.

Under the rule of each of the justiciars, but more especially of Hubert Walter and his successor, Geoffrey Fitz-Peter, the administrative system established by Henry II. was maintained and considerably developed. By the extensive application of the principle of representation to the assessment of the taxes on both real and personal property, the people were gradually educated for self-government. In the year 1194, the principle of election in the appointment of county officers was introduced. Coroners, three knights and a clergyman, were ordered to be elected in every county, to hold pleas of the crown (*e*). The advance made by the boroughs towards independence through the charters which, as a means of raising money, were extensively sold to them, is also an important feature of this reign. In some instances the privileges granted were assimilated to those of the citizens of London, which served as a model for the provincial towns, and included the right of electing the town-reeve (*f*). On the occasion of Longchamp's deposition, in which, as we have seen, the citizens of London concurred, they secured a formal recognition, by the justiciar and barons, of their existence as a

Election of county coroners.

Charters granted to boroughs.

(*d*) Hallam, Middle Ages, ii. [322].

(*e*) Capitula placitorum Coronae Regis, cap. 20; Select Chart., 252.

(*f*) *Cf.* Charter of Richard I. to Lincoln, 1194, in Rymer, i. 52, and Select Chart., 258.

"*communa*," the exact meaning of which is not quite clear, but which was certainly a near approach to what is understood by a "corporation" (*g*). In connection, doubtless, with this establishment of the *communa*, the mayor now appears for the first time.

Summary.

On the whole, the reign of Richard, through no merit, however, of his own, was beneficial to the liberties of the people. They became accustomed to the rule of law as opposed to the rule of force. Even the unexampled taxation was levied with the appearance of legal formality. The immense sums raised are a proof that the kingdom had rapidly advanced in wealth during the preceding reign. The baronage, which had been severely repressed under Henry II., became at once more orderly and less inclined than formerly to submit to the caprice of the sovereign, to whose personal interference they had become unaccustomed. The fusion of the two races, nearly accomplished under Henry II., was silently worked out under Richard; and in the following reign we shall find the barons and people claiming for themselves against the crown the common liberties of Englishmen.

(*g*) Bened. Abb., ii. 214, *s. a.* 1191; Select Chart., 244. No boroughs were incorporated as municipal corporations, in the modern sense of the term, till the reign of Henry VI.—Merewether and Stephens on Boroughs, vol. i. Introd.

CHAPTER IV.

MAGNA CARTA.

THREE great political documents, in the nature of fundamental compacts between the crown and the nation, stand out as prominent landmarks in English constitutional history. Magna Carta, the Petition of Right, and the Bill of Rights constitute, in the words of Lord Chatham, "the Bible of the English Constitution." In each of these documents, whether it be of the thirteenth or of the seventeenth century, is observable the common characteristic of professing to introduce nothing new. Each professed to assert rights and liberties which were already old, and sought to redress grievances which were for the most part themselves innovations upon the ancient liberties of the people (*a*). In its practical combination of conservative instincts with liberal aspirations, in its power of progressive development and self-adaptation to the changing political and social wants of each successive generation, have always lain the peculiar excellence, and at the same time the surest safeguard, of our constitution (*b*).

The three great fundamental compacts between the crown and the nation

The Great Charter of Liberties was the outcome of a movement of all the freemen of the realm, led by their natural leaders the barons (*c*). Far from being a "mere

The Great Charter, an act of the whole people under the leadership of the barons.

(*a*) *Cf.* the paper by C. H. McIlwain, Magna Carta and Common Law, in Magna Carta Commemoration Essays (1917), pp. 122-179.

(*b*) *Cf.* Palgrave, Eng. Commonwealth, i. 6.

(*c*) [Stubbs, Const. Hist., i. 571, calls the Great Charter "the first great public act of the nation after it had realised its own identity: the consummation of the work for which unconsciously kings, prelates, and lawyers had been labouring for a century": but *cf.* E. Jenks, The Myth of Magna Charta, in the *Independent Review*, Nov., 1904, in which he forcibly argues against the idea that the Charter should be seriously taken as a great landmark in English constitutional history. On the whole subject, see W. S. McKechnie, Magna Carta (Glasgow, 1905); Holdsworth, Hist. of English

piece of class legislation" extorted by the barons alone for their own special interests, it is in itself a noble and remarkable proof of the sympathy and union then existing between the aristocracy and all classes of the commonalty. At least one-third of its provisions relate to promises and guarantees on behalf of the people in general, as contra-distinguished from the baronage. But one fact is specially significant. The important and comprehensive clause (60), by which the customs and liberties granted to the king's tenants-in-chief are expressly extended to every sub-tenant in the kingdom, did not, like the similar provision in the Charter of Henry I., emanate from the king, but was spontaneously included by the barons themselves in the articles presented to John as a summary of their demands (*d*).

The Charter a treaty of peace.

The eminently moderate, practical, and conservative character of the barons' demands is especially noticeable. Magna Carta was in fact a treaty of peace between the king and his people in arms; yet their ancient rights and liberties, the acknowledgment of which had been extorted from the king, were expressed to flow from his grant. There is nothing theoretical or revolutionary in the Charter; no declaration of abstract principles of government, but merely a practical assertion of rights as between the crown and the subject, and, as a natural corollary under a system of feudal tenures, between mesne lords and their sub-vassals. Its language is "simple, brief, general without being abstract, and expressed in terms of authority, not of argument, yet commonly so reasonable as to carry with it the intrinsic evidence of its own fitness. It was understood by the simplest of the unlettered age

Law, vol. ii., pp. 165-172; and H. E. Malden (Ed.), Magna Carta Commemoration Essays (London, 1917). For events preceding Magna Carta, *cf.* Lappenberg-Pauli, iii. 293-487. "The most significant new basis is doubtless the reconciliation of the national antipathies . . . a blending of nationalities. . . . But, in this blending, the Germanic element had become the preponderating one. . . . Magna Charta did not arise from the Franco-Norman, but from the national spirit," and again, "Magna Charta was also a pledge of the reconciliation of the classes."—Gneist, Hist. Engl. Const., pp. 243 and 253; *vide* also H. Taylor, Engl. Const., pp. 381 *seq.*—Ed.]

(*d*) Articles of the Barons, c. 48, Blackstone's Charters, pp. 1-9, and Select Chart., p. 286; Magna Carta, c. 60, *infra*, pp. 103 *seq.*; Stubbs, Const. Hist., i. 567.

for whom it was intended. It was remembered by them, and, although they did not perceive the extensive consequences which might be derived from it, their feelings were, however unconsciously, elevated by its generality and grandeur" (*e*).

Based on precedent.

Coke has remarked that the Charter was for the most part "declaratory of the principal grounds of the fundamental laws of England" (*f*). It was in fact founded on precedent. Its bases were the Charter of Henry I., and the law as administered in the time of good King Edward. The law of the Confessor had been renewed by William the Conqueror, and again expressly confirmed by Henry I. in his Charter. A copy of this Charter produced to the barons by the archbishop, Stephen Langton, in 1213, formed the groundwork of their demands. In this way the Great Charter may be regarded as the lineal representative of the laws of King Edward, which from this time ceased to form the popular cry of good government (*g*).

The keystone of English liberty.

The importance of Magna Carta can hardly be exaggerated. It has been well characterised by Hallam as the "keystone of English liberty," to which all that has since been added is "little more than confirmation or commentary." And Sir James Mackintosh has insisted upon the noticeable fact that the consequences of its principles were but slowly and gradually evolved, as circumstances required, during the five succeeding centuries (*h*).

Events leading to its granting.

Several causes worked together to bring about the state of affairs which compelled John to grant the Great Charter. Foremost among these was the fortunate loss of Normandy (*i*). The barons, confined within the limits

(*e*) Sir J. Mackintosh, Hist. of Eng., i. 220, 221.

(*f*) Coke, 2nd Inst., Proeme.

(*g*) According to Matthew Paris, Archbishop Langton, at the meeting at St. Paul's, on August 25, 1213, assured the barons that before absolving John from the excommunication he had compelled him to swear to restore the laws of King Edward.

(*h*) Mackintosh, Hist. Eng., i. 221.

(*i*) "The talents and even the virtues of England's first six French kings were a curse to her. The follies and vices of the seventh were her salvation. . . . John was driven from Normandy. The Norman nobles were

Loss of Normandy.

of England, concentrated their attention upon its affairs. They became thoroughly English in interests and sympathies, and united with the people against the tyranny of the king. Moreover, a great part of the baronage now consisted of the new ministerial families raised up by the policy of Henry I. and Henry II. These were far less closely connected with Normandy than the baronage of the conquest, and their sympathies were national rather than feudal.

The loss of Normandy was itself in a great measure due to the decay of feudalism, the result of Henry II.'s policy. John, who was not altogether destitute of energy and courage, made some efforts to recover Normandy, but the barons, especially in the north of England, where the possessions of the new families chiefly lay, refused to follow the king, alleging that they were not bound to military service abroad.

Intimately connected with this refusal, and with the exaction of the Charter, was the personal character of the king, which inspired utter distrust and aversion in all classes of his subjects. In disposition and character John was an oriental despot, a tyrant of the worst sort. Under

compelled to make their election between the island and the continent. Shut up by the sea with the people whom they had hitherto oppressed and despised, they gradually came to regard England as their country, and the English as their countrymen. The two races, so long hostile, soon found that they had common interests and common enemies. Both were alike aggrieved by the tyranny of a bad king. Both were alike indignant at the favour shown by the court to the natives of Poitou and Aquitaine. The great-grandsons of those who had fought under William and the great-grandsons of those who had fought under Harold began to draw near to each other in friendship; and the first pledge of reconciliation was the Great Charter, won by their united exertions and framed for their common benefit."—Macaulay, Hist. Eng., i. 15. The Channel Islands—the only Norman territory not lost—still continue attached, as a separate dependency, to the English Crown. ["The Isle of Man and the Channel Islands are not parts of the United Kingdom, though king and Parliament can make laws for them. The statutes made by Parliament do not affect them, unless they are specially mentioned, or it is evident from the context that they were within the purview of the legislature. The appeal from their courts is not to the House of Lords, but to the king in council. The interest of these small dependencies lies in this, that the relation between them and England formed a precedent for the treatment of the vaster dependencies which have gradually collected round the United Kingdom."—Maitland, Const. Hist., p. 337. See also Anson, Law and Custom of the Constitution, vol. ii., pt. 2 (1908), pp. 50-58.—Ed.]

Henry II. and the ministers of Richard I., the nation had become accustomed to the rule of law; John set at defiance all laws, human and divine (*k*). Supported in his tyranny by bands of foreign mercenaries, he not only taxed and fined his subjects of every degree with an open disregard of all legal restraints (*l*), but was guilty of acts of cruelty rivalling those of Nero (*m*). The church, the baronage and the people, united by common oppression in a common hatred of the tyrant, were compelled to make a stand not so much for constitutional government as for personal liberty.

Struggle with the Papacy.

In his struggle with the papacy, arising out of the disputed election of a successor to Hubert Walter in the archiepiscopal see of Canterbury, John had to deal with a man of consummate ability, who had carried to the highest point, both in theory and practice, the doctrine of the paramount suzerainty of the pope. As a matter of fact, freedom of election to the higher ecclesiastical benefices, however it might accord with canonical requirements, had never been practically recognised by the English kings. Prior to the Norman conquest, the appointments had been made in the Witenagemot, and afterwards by the king in the Curia Regis, or Great Council of the Realm. The political power of the bishops, of the Archbishop of Canterbury especially, was so great in early and mediæval times, that it would seem to have been a state necessity that their nomination should rest with the supreme civil authority. Although the form of election was conceded by Henry I., the process, under what was subsequently termed a *congé d'élire*, was free only in name. At this time, whether from the king's weakness or from the spread of high ecclesiastical doctrines throughout Europe under the powerful and successful leadership of Innocent III., the monastic chapter of Christ Church, Canterbury, attempted to assert their right of election, and chose their sub-prior. In the meantime the king directed

(*k*) Annal. Waverl. (ed. Luard), p. 282.

(*l*) *S. a.* 1205. Matt. Paris [Chron. Maj., ed. Luard, ii. 490], *s. a.* 1210. Ann. Waverl., p. 264.

(*m*) *Cf.* Matt. Paris [Chron. Maj.] (ed. Luard), ii. [531, 537]. Roger of Wendover, Chron. iii. 235, and Ann. Waverl., p. 265.

the suffragan bishops to elect John de Grey, Bishop of Norwich. The case was carried before Innocent, who set both elections aside, and himself nominated Stephen Langton, an Englishman of the highest character and great reputation for learning (*n*). In this proceeding the pope distinctly infringed upon the rights of the king, of the Chapter of Canterbury, and of the English nation; but fortunately for the [realm], he made as great a mistake in the person of his nominee as Henry II. found he had made in nominating Becket.

John determined not to submit, and refused to receive Langton as archbishop. The pope then (1208) placed the kingdom under interdict (which suspended the whole religious life of the nation). The people were made to suffer in order that they might put pressure on the king. John, not proving amenable to vicarious punishment, was formally excommunicated (1209), and ultimately (in 1212) deposed.

Threatened by Philip of France, whom the pope had empowered and directed to take possession of the forfeited kingdom of England, and feeling no reliance on the support of his alienated people, John at length gave in. From the extreme of arrogance and violence he now passed to the extreme of abject submission. He not only accepted Langton as archbishop, and promised restitution of the money extorted from the church, but surrendered his kingdom to Pandulf the pope's envoy, receiving it back as a fief of the Holy See, subject to the annual tribute of one thousand marks (*o*). A few months afterwards, the act of submission was renewed to Nicholas, Bishop of Tusculum, with the actual performance of liege homage on the part of the king (*p*). This submission was undoubtedly a disgrace, although not quite to the same extent

(*n*) The claim of the bishops to share in the election of the archbishops was enforced on several occasions during the twelfth century, but after its rejection by Innocent III. was never advanced again.—Stubbs, Const. Hist., iii. 313.

(*o*) See the concession of the kingdom to the pope and the form of oath of fealty in Rymer, i. 111, and Select Chart., 276. The 1,000 marks were apportioned 700 for England and 300 for Ireland. [See von Raumer, Geschichte der Hohenstaufen (Leipzig, 1825), vol. vi., p. 106.—Ed.]

(*p*) Ann. Waverl., 277, 278; Select Chart., 269.

as it would be now. It was, however, a startling falling off from the position which Henry II. had occupied, that one of his sons should do homage to the emperor and another to the pope.

The surrender of the temporal and spiritual independence of the kingdom completed the alienation of the people from the king, whose misgovernment had brought on this national humiliation. On the other hand, the pope now, having secured submission, changed his tactics, and supported the tyranny of his vassal. The barons determined upon resistance, and the national church, headed by Archbishop Langton, gave the weight of its influence to the patriotic side.

The struggle with the barons.

It may be convenient briefly to notice the most important events which immediately led up to the grant of the Charter (*q*). The open quarrel with the barons began in July, 1213, with the refusal of the northern nobility to follow John to France. While the king was vowing vengeance against his recalcitrant vassals, two important councils of the bishops and barons were held, the first at St. Albans, on August 4, the second at St. Paul's, London, on August 25. They were summoned ostensibly for the purpose of assessing the compensation promised to the church; but the justiciar, Geoffrey FitzPeter, and Archbishop Langton seized the opportunity of introducing a discussion on the king's general misgovernment. The half-forgotten charter of Henry I., having been referred to generally at St. Albans as the standard of the people's liberties, was at St. Paul's produced by the archbishop, and adopted as the basis of the barons' demands.

Council of St. Albans.

The assembly at St. Albans has a special importance of its own, as the first historical instance of the summons of representatives to a National Council. It was attended not only by the bishops and barons, but by the representative reeve and four men from each township on the royal demesne. It is something more than a mere coincidence that to this National Council, in which the element of direct representation of the people, long familiar in the

(*q*) For a more detailed statement, see Blackstone, Int. to the Charters; and Stubbs, Const. Hist., i. 565-571.

folkmoot of the shire, appears for the first time, were presented the first outlines of the reforms subsequently elaborated in the articles of the barons, and promulgated in the Great Charter (*r*).

During the greater part of the year 1214, John was absent on the continent, whence he returned in October. In the meantime, the barons met at Bury St. Edmund's, and entered into a confederacy, binding them, if the king would not acknowledge the rights which they claimed, to withdraw their fealty and make war upon him until by a sealed charter he should confirm the laws and liberties of the people (*s*).

Confederacy of the barons at Bury St. Edmunds.

On January 6, 1215, the barons in arms presented their demands to the king at the Temple, and, at his urgent request, conceded a respite until after Easter, in order that he might have time for consideration (*t*).

In this interval John did all he could to break up the combination against him. He granted a separate charter to the church (*u*), giving freedom of election of bishops and abbots; he ordered the sheriffs to administer the oath of allegiance and fealty to the freemen of every shire; he assumed the cross, in order to gain the special protection of the church as a crusader; and he attempted to detach the barons by offering them special terms. But the national party continued firm and united. The barons, strengthened by numerous adhesions since the Councils of St. Albans and St. Paul's, assembled in arms at Stamford; and when the stipulated time had expired without an answer from the king, marched under the leadership of Robert FitzWalter, "Marshal of the army of God and of the Holy Church in England," to Brackley, in Northamptonshire. Here the king sent to ask their demands, but when these were submitted to him, peremptorily refused to grant them. The barons now continued

The barons assemble in arms at Stamford and march to London.

(*r*) Stubbs, Const. Hist., i. 567. "The action of this council is the first hesitating and tentative step towards that great act in which Church, baronage, and people made their constitutional compact with the king, and their first sensible realisation of their corporate unity and the unity of their rights and interests."

(*s*) Matt. Paris [Chron. Maj., ed. Luard, ii. 583].

(*t*) *Ibid.* ii. 584.

(*u*) First granted November 21, 1214; re-issued January 21 following.

their march to London, which they entered on May 24, amidst the acclamations of the citizens. The support of the Londoners seems to have decided the contest. The small, but by no means unimportant, section of the baronage, which had hitherto remained faithful to the king, now went over to the confederacy, and with them most of the officials of the Curia Regis and Exchequer and even of the king's household (*w*).

The support of the Londoners decides the contest.

Deserted by all but a few personal adherents, chiefly of foreign extraction, and utterly incapable of further resistance, John accepted the articles of the barons, which were embodied in the Great Charter at Runnymede, on June 15, 1215 (*x*).

The Charter granted.

Analysis and Summary of the Charter.

Magna Carta contains, in addition to the preamble, sixty-three clauses inserted without much regard to orderly arrangement. Its chief provisions may be conveniently grouped and summarised as follows:

1. Commencing with the declaration that the church shall be free with all her rights and liberties inviolate, and expressly confirming the freedom of election which he had already granted by separate charter, John grants to all the freemen of the kingdom ("words," remarks Coke, "which extend also to villeins, for they are accounted free against all men, saving against the lords") the following liberties:

Liberties of the church.

I.—*Feudal Obligations.*

2, 3. The heir (if of age) shall pay only "the ancient relief"—viz., in the case of an earl or baron, £100; of a knight, 100s.; of one holding less than a knight's fee, less

Reliefs.

(*w*) Blackstone, Introduction to the Charters.

(*x*) [The Law Books of Bracton, Britton and Fleta hardly refer to it. It was reserved to the jurisprudence of much later days to take especial cognisance of the text of this famous document. *Cf.* Blackstone, The Great Charter (Oxf., 1759); Coke, Inst. ii., pp. 1-78; Stubbs, Select Charters, pp. 288-297.—Ed.]

in proportion (*y*). A minor, who is in ward, shall have his inheritance, on coming of age, without relief or fine.

By the charter of Henry I. reliefs were to be "justa et legitima." The sum is now defined (*z*).

Wardships.

4, 5. Guardians shall take only reasonable fruits and profits, without destruction or waste; and shall keep up the estate in proper condition during the wardship.

By Henry I.'s charter, the widow or next of kin was to be the guardian. The Assize of Northampton (1176) directed that the lord of the fee should have the wardship. Magna Carta remedies the *abuses* of wardship (*a*).

Marriage.

6. Heirs shall be married without disparagement, their near blood relations having notice beforehand.

Henry I.'s charter bound the king to consult his baronage as to the marriage of heiresses. In the Articles of the Barons "haeredes" were to be married "*per consilium* propinquorum de consanguinitate sua." In the Charter itself this is softened down to barely giving *notice* to the relations; and even this requirement was omitted in Henry III.'s re-issues. By a strained construction, the word "haeredes" was held to include male as well as female heirs (*b*).

Widows.

7, 8. A widow shall receive freely, within forty days of her husband's death, her dowry and inheritance; and shall have her quarantine (forty days' residence) in the family mansion. She shall not be forced to re-marry; but if she wish to do so, must obtain the lord's consent.

The king and other feudal lords sometimes forced the widows of their tenants to re-marry in order to gain the fine payable for consenting to the marriage. This abuse is here forbidden.

Aids of mesne.

15. The king shall not empower mesne lords to exact other than the three ordinary aids—to ransom the lord's person, to knight his eldest son, and once to marry his eldest daughter,—and these of reasonable amount.

Services.

16. No one shall be compelled to render more than the due service for a knight's fee or other free tenement.

(*y*) On "barons" and "knights" in the Great Charter, see the paper by J. H. Round, in Magna Carta Commemoration Essays (1917), pp. 46-77.
(*z*) *Supra*, pp. 57, 72, 73, 74.
(*a*) *Supra*, pp. 57, 74.
(*b*) *Supra*, pp. 58, 74.

29. No knight shall be compelled to pay for castle-guard, if he be willing to perform the service in person, or (on reasonable excuse) by a proper deputy; and whilst on service in the army, he shall be free from the duty of castle-guard. Castle-guard.

32. The king shall not hold the lands of convicted felons except for a year and a day, at the expiration of which time the lands shall be given up to the lords of the fees. Lands of felons.

By the common law, the lands of a person attainted of treason were forfeited to the crown; but on attainder of petit-treason or felony, they escheated to the immediate lord, subject, however, in this case, to the king's right to hold them for a year and a day (*c*). By the 54th George III. c. 145, the forfeiture was limited (except in the cases of treason, petit-treason, or murder) to the life interest of the offender; but the personal property of all felons continued liable to be forfeited to the crown down to 1870. In former times attainder also worked "corruption of blood," the effect of which was to prevent any inheritance being claimed from or *through* the attainted person. This harsh law was considerably mitigated by the 54th George III. c. 145, and other statutes, and finally by the 33rd & 34th Vict. c. 23, passed in 1870, it was enacted that (with the single exception of forfeiture consequent upon outlawry) "no confession, verdict, inquest, conviction, or judgment of or for treason, or felony, or felo-de-se, shall cause any attainder, or corruption of blood, or any forfeiture or escheat."

37. The king shall not have the wardship of land held in chivalry of a mesne lord, by reason of the sub-tenant also holding other land of the king, either in fee-farm, socage, burgage, or petit-serjeanty; nor the wardship of such fee-farm unless it owe military service (*d*). Wardship of lands held of mesne lords.

43. The tenants of baronies escheated to the crown shall only pay the same relief and perform the same services as if the land were still held of a mesne lord. Escheated baronies.

46. Barons who have founded abbeys shall have the custody of them when vacant. Abbeys of private foundation.

The constitutional importance of these remedial provisions, grouped under the above head of "Feudal Obligations," consists

(*c*) 2 Hawkins, Pleas of the Crown, c. 49, ss. 1, 2.
(*d*) For an explanation of these feudal tenures, see *supra*, p. 55 *seq.*

in the evidence which they afford of the vexatious and increasingly onerous character of the exactions of the feudal monarchy of the Norman and early Angevin kings.

II.—*Administration of Law and Justice.*

Common Pleas.

17. Common Pleas shall not follow the king's court, but be held in some certain place.

The intent of this clause was that suitors might always have a fixed and settled court to resort to, instead of being subjected, as formerly, to the great expense and inconvenience of following the king in his progresses through the kingdom.

Assizes.

18, 19. The recognitions of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall only be held in the court of the county where the lands in question lie. The king, or in his absence the chief justice, shall send two justices into each county four times a year, who, with four knights to be chosen by the county court, shall hold such assizes. If all the matters cannot be determined on the day appointed for each county, a sufficient number of knights and freeholders present at the assizes shall stay to decide them.

Amercements.

20. A freeman shall only be amerced, for a small offence after the manner of the offence, for a great crime according to the heinousness of it, saving to him his contenement: and, after the same manner, a merchant saving his merchandise, and a villein saving his wainage: the amercements in all cases to be assessed by the oath of honest men of the neighbourhood.

21. Earls and barons shall not be amerced but by their peers, and according to the degree of the offence.

22. No clerk shall be amerced for his lay tenement except according to the proportions aforesaid, and not according to the value of his ecclesiastical benefice.

These clauses (20, 21, 22) were primarily intended as a safeguard against the tyrannical extortions, under the name of amercements and fines, with which John had oppressed his people. At the same time they inculcate the general principle that punishments ought to be proportioned to the offence, and assert the right of all men, from the baron to the villein, to the *judicium parium*. The term "amercement" is derived through

the old French *amercier*, from the Low Lat. *amerciare*, both meaning "to fine," and signified the pecuniary mulct laid upon an individual who had offended the king. "Contenement" signifies that which is indispensable for a man's support and maintenance, according to his rank or occupation, as the armour of a soldier, the books of a scholar. Thus in Glanvill (*e*), the mesne lord is to demand reliefs from his sub-tenants "secundum facultates, ne nimis gravari inde videantur vel suum *contenementum* amittere." "Wainage" (the wagon or wain, and other implements of husbandry) was the contenement of the villein or husbandman. At the present day the tools (contenement) of a workman cannot be taken on a distress of rent.

Pleas of the crown.

24. No sheriff, constable, coroner, or bailiff of the king shall hold pleas of the crown (*f*).

This clause is important as marking an era in the history of our criminal judicature. It secured the trial of all serious crimes before the king's justices, men of learning and experience in the law. Its practical effect was to take away from the county court and the other inferior local tribunals the jurisdiction of nearly all criminal matters. This important judicial reform was not a sudden act, but the result of a gradual process. In the Assize of Clarendon, A.D. 1166, the itinerant justices and the sheriffs are directed to share the office of judge between them (*g*). A further step was taken in 1194, when it was ordered that no sheriff should be a justice in his own county (*h*). Magna Carta deprived sheriffs and other local officers of all jurisdiction over pleas of the crown. "Pleas of the crown" are criminal prosecutions carried on in the name of the sovereign, "who is supposed by the law," remarks Blackstone, "to be the person injured by every infraction of the public rights of the community." The word "constables" meant castellans, or constables of castles, of which

(*e*) De leg. et cons., l. ix., c. 8.

(*f*) [With regard to pleas of the crown, Bigelow, Hist. of Procedure in Eng., p. 245, says that the term *placita coronæ* was "not yet used in the sense now attached to it. It simply meant business of concern to the Crown, reported to the Eyre by the jurors as having transpired in the particular district since the last visitation or report. The 'pleas of the Crown' in the modern sense (*i.e.*, common criminal prosecutions) appear to have been tried mostly in the popular courts, before the coming of the Eyre, at least in the time of the Rotuli Curiæ Regis (1194-1199); and considered merely as prosecutions of crime, these were not 'placita coronæ' at all." To the same effect Maitland, Pleas of the Crown, Glouc., 5 Hen. III., Int., p. xxvi. Gneist, Hist. Engl. Const., p. 247, remarks on this clause: "It is manifest again from this, how popular the centralisation of justice at the expense of the country and town bailiffs had become."—ED.]

(*g*) Assize of Clarendon, c. 1. (Select Chart., 137.)

(*h*) Forma procedendi in placitis Coronæ Regis, c. 21. Hoveden, ii. 262-267. Select Chart., 225.

in the time of Henry II. there were upwards of eleven hundred in England. These constables possessed considerable power, and within the precincts of the manors upon which their castles were built, held trials of criminal charges, as the sheriffs did within their respective counties. In manors not having a castle, the criminal and civil jurisdiction of the lords was exercised by the stewards or bailiffs. The convenience of secure prisons afforded by these private castles caused prisoners charged with crimes in the counties to be frequently committed to the custody of the constables, who too often abused their trust. Nearly two hundred years after the Great Charter, a statute (5th Henry IV. c. 10) directed justices of the peace to imprison in the common gaol, "because that divers constables of castles within the realm of England be assigned to be justices of the peace by commission from our lord the king, and by colour of the said commission they take people to whom they bear ill-will and imprison them within the said castles till they have made fine and ransom with the said constables for their deliverance." The depriving of such men of the power to try prisoners was a great boon to the people.

Writ of præcipe in capite.

34. The writ called *præcipe* shall not in future be issued so as to cause a freeman to lose his court.

This seems to be a concession to the old feudal party. Its object was to protect the local jurisdiction of the courts baron. The tenant of a mesne lord, if disseised of his land, was obliged to sue for its recovery, in the first instance, in the court baron of his immediate lord. The writ of *præcipe in capite* was the process by which such causes were called up into the king's court.

Writ *De odio et atiâ.*

36. The writ of inquest of life or limb shall be given *gratis*, and not denied.

The object of this clause was to prevent the long imprisonment of a person charged with a crime without examining into his guilt or innocence. The writ referred to was that "*De odio et atiâ*" (analogous to that of *habeas corpus*), and was the only means by which a person imprisoned on a charge of homicide could procure the privilege, in certain circumstances, of being released on bail to await the *iter* of the king's justices (*i*). The writ was not, however, issuable as of right, but only as a matter of royal favour (ex regiæ potestatis beneficio). Advantage was taken of this circumstance during John's reign to extort large sums of money for the privilege (*k*). Magna Carta made it grantable as a matter of right, and without payment. Henceforth it became one of the greatest securities of personal liberty.

(*i*) Glanvill, lib. xiv. c. 3.
(*k*) See Bracton, vol. ii., Introd. lxii., by Sir Travers Twiss.

38. No bailiff for the future shall put any one to his law (*ad legem*) upon his own bare saying, without credible witnesses to prove it. Wager of law.

The meaning of this clause has been disputed. By "ad legem" may have been signified the *ordeal*, to which reputed criminals were not to be subjected except on the presentment of a jury of the hundred (Assize of Clarendon, in 1166; Richard I.'s Articles of Visitation, in 1194). But the ordeal was declared unlawful by the Lateran Council in November 1215, and this clause of the Charter was repeated in the re-issue of 9 Hen. III. c. 28. The Mirror of Justice (a compilation of the reign of Edward II. or the early part of Edw. III.) explains it, "that no justice, no minister of the king, nor other officer nor bailiff, have power to make a freeman make oath without the king's command, nor receive any plaint without witnesses present, who testify the plaint to be true." Wager of law was a relic of the old English trial by compurgators. Before a man could be put to his law or his oath, which meant the same thing, the accuser had to produce his witnesses, a practice which became obsolete in the time of Edward III., when the names of the fictitious and but lately defunct John Doe and Richard Roe, the common pledgers of prosecution, make their appearance (*l*).

42. In future any one may leave the kingdom and return at will, unless in time of war, when he may be restrained "for some short space for the common good of the kingdom." Prisoners, outlaws, and alien enemies are excepted, and foreign merchants shall be dealt with as provided in the 41st clause (*m*). *Ne exeat regno* restrained.

This clause has some ecclesiastical interest, as it removed a practical impediment in the way of appeals to Rome. It was among the clauses reserved for further consideration in Henry II.'s first re-issue of the Charter, and was never afterwards restored. The sovereign still retains the prerogative of preventing any subject from quitting the realm, by the writ *ne exeat regno*. Coke points out (*n*) that although by the common law every one had liberty to go abroad when he would, unless specially enjoined to remain at home, there were formerly certain orders of men under a continual prohibition from quitting the realm, without the king's previous licence. Peers were thus prohibited, because they were the counsellors of the crown; knights, because they were to defend the kingdom from invasion; all ecclesiastics,

(*l*) See Reeves' Hist. of English Law, ed. Finlason, i. 283.
(*m*) See *infra*, p. 118.
(*n*) 3 Inst. c. 84.

because they were confined by a special law (Assize of Clarendon, 10 Hen. II.), on account of their attachment to the see of Rome; and all archers and artificers, lest they should instruct foreigners how to rival the manufactures of England. In 1381 a statute (5 Ric. II. c. ii.) prohibited all persons whatever from going abroad without licence, except only the lords and other great men of the realm, true and notable merchants, and the king's soldiers. This was not repealed till the 4th James I. c. i. i. In his reign, however, various Acts were passed restraining, as a particular guard against the papacy, the sending, without licence, any children out of the realm, to seminaries beyond sea, or for any cause whatever, as well as an Act (3 Jac. I. c. 4) making it felony for any person leaving the realm to serve a foreign prince. The writ *ne exeat* is now, in practice, only used to prevent a party to an action in respect of equitable debts and claims from withdrawing his person and property from the jurisdiction of the court.

Forest courts.

44. Persons dwelling without the limits of a forest shall not in future be compelled to attend the king's forest courts upon common summons, unless they be impleaded or be pledges for others attached for something concerning the forest.

Henry II., in the Assize of Woodstock (1184), had established an exact analogy between the courts of the shire and those of the forest, all men being required to attend the king's forest court, which exercised supreme jurisdiction over all woods and forests, whether a part of the royal demesne or not. He appointed justices to visit the forests at the same time and on the same system as the justices itinerant. Compulsory attendance at the forest courts, which was regarded as a great grievance, was abolished by this clause of the Charter. Other remedial provisions were added in the Carta de Foresta of Henry III. (1217).

Judges to be skilled in the law.

45. Justices, constables, sheriffs, and bailiffs shall only be appointed of "such as know the law and mean duly to observe it."

Appeal by a woman for death of her husband.

54. No one shall be taken or imprisoned on the appeal of a woman except for the death of her husband.

In cases of death by murder or manslaughter, an "appeal" of felony was allowed to be brought by certain relations only of the deceased; by the widow for the death of her husband, or by the heir male for the death of his ancestor. The word "appeal" is not used here in the ordinary sense of a complaint to a higher court for injustice done by an inferior one; but signifies an accusation or challenge, an original suit by one subject against

another, rather because of his own peculiar damage than for an offence against the public. The origin of this private process for the punishment of public crimes was doubtless derived from the old days when a *wergild* was payable to the relatives of the slain. The defendant in an appeal had the right of trial by battle. The parties were obliged to fight in their own persons, unless the appellant were a woman, a priest, an infant, lame, blind, or sixty years old, in any of which cases he might "counterplead the battel" and compel the defendant to put himself upon trial by his country. It was perhaps because the appellee lost his right of defending himself by combat when the appellant was a woman that her appeal was limited to the death of her husband. If the appellee were worsted in the combat, or found guilty, he suffered the same judgment as if convicted on an indictment; but the crown had no power to pardon him, because an "appeal" was a private suit (*o*). From the date of the statute 3 Hen. VII. c. i., an appeal might be brought even after the appellee had been tried and acquitted on an indictment. The "battel" took place in the presence of the judges of the Court of Common Pleas, attired in their scarlet robes, who sat looking on while the combatants, each armed with a staff an ell long, and a leathern shield, cudgelled each other from sunrise to star-rising, or until one of them cried "craven." Though long obsolete, neither appeals nor trials by battle were legally abolished till the early part of the nineteenth century (*p*). In 1817 a writ of appeal was tried in the court of King's Bench against Abraham Thornton, for the alleged rape and murder of Mary Ashford. The appellee, who had already been tried and acquitted at Warwick Assizes on the same charge, cast down his glove in open court and formally demanded trial by battle against the appellant, the brother of the deceased. The court having allowed the demand, time was given for due consideration of the novel circumstances of the case; ultimately the appellant declined to accept the challenge, and the defendant was discharged without bail on Oct. 20, 1818 (*q*). This led to the passing (22nd June, 1819) of the statute 59 George III. c. 46, intituled "An Act to abolish appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue and trial by battel in writs of right."

III.—*Fundamental Principles of the Constitution.*

No scutage or extraordinary aid to be imposed.

12. No scutage or aid shall be imposed unless *per commune concilium regni*, except in the three cases of ransoming the king's person, making his eldest son a

(*o*) See Glanvill, lib. iv.; Bracton, lib. iii.; Britton, lib. i.; Hawkins, Pleas of Crown, ii. 392.

(*p*) See *supra*, pp. 64, 85.

(*q*) See *Ashford* v. *Thornton*, [1818] 1 Barn. & Ald. 405.

knight, and once for marrying his eldest daughter; and for these the aids shall be reasonable. In like manner it shall be concerning the aids of the city of London.

Method of summons to the National Council.

14. In order to take the common counsel of the nation in the imposition of aids (other than the three regular feudal aids) and of scutage, the king shall cause to be summoned the archbishops, earls, and greater barons, by writ directed to each severally, and all other tenants *in capite* by a general writ addressed to the sheriff of each shire; a certain day and place shall be named for their meeting, of which forty days' notice shall be given; in all letters of summons the cause of summons shall be specified; and the consent of those present on the appointed day shall bind those who, though summoned, shall not have attended.

These two clauses (12, 14) surrender the royal claim to arbitrary taxation, and lay down the principle that the nation ought not to be taxed except by consent of the National Council. Talliages upon towns are not indeed included. The towns were still to a great extent in the position of demesne lands of the king or other lord, and their inhabitants in a state of quasi-villeinage. They had yet to work their way into acknowledged participation in the rights here admitted to belong to all the free landholders of the kingdom. It is noticeable that in the "Capitula quae Barones petunt et Dominus Rex concedit" (the rough draft of the barons' demands, subsequently embodied in the Charter), after the provisions against levying scutage or aids except by consent of the National Council, occur the words: "Simili modo fiat de *tallagiis* et auxiliis de civitate Londoniarum *et de aliis civitatibus* quae inde habent libertates." The barons evidently intended to make the prohibition of arbitrary taxation general, and to protect the citizens and burgesses equally with the landholders; but for some unexplained reason, these words were omitted in the Charter itself. The city of London can never have been regarded as a demesne of the crown, and it is accordingly here ranked with free tenants *in capite*. The word "baron" was of wide signification, including, if not all freeholders, all free tenants in chief. It had not yet become a title in its modern acceptation. The citizens of London and of the Cinque Ports were sometimes designated "barons." While the "greater barons" developed into the House of Lords, the "lesser barons" became absorbed in the mass of the commonalty, and were represented, with the towns, in the House of Commons. The significance of the 14th clause, as defining the method of summoning the National Council, will be dis-

cussed later on in the chapter on the "Origin of Parliament." Although the 12th and 14th clauses were omitted in Henry III.'s renewals of the Charter, the form of a grant appears to have been generally observed throughout his reign (*r*).

Judicium parium.

39. No free man shall be taken or imprisoned or disseised, or outlawed, or exiled, or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land (*s*).

No sale, denial or delay of justice.

40. To none will we sell, to none will we deny or delay, right or justice.

In these clauses of the Charter, remarks Sir James Mackintosh (*t*), "are clearly contained the habeas corpus and the trial by jury, the most effectual securities against oppression which the wisdom of man has hitherto been able to devise." Hallam has termed them the "essential clauses," as being those which "protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation." There is a breadth about the simple language employed, as if those who wrote it felt that they were asserting universal principles of justice. Henceforth "it must have been a clear principle of our constitution that no man can be detained in prison without trial. Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from that era the right of every subject to demand it" (*u*). Coke, commenting on these clauses (as they stand combined in the 29th clause of the 9th of Henry III. with the words "de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis," inserted after "dissaisietur"), points out that the evils from which the laws of the land are to protect the subject are here recited in the order in which they most affect him.

(1) *Nullus liber homo capiatur vel imprisonetur;* because the liberty of a man's person is more precious to him than all the rest that follows; and the word "taken" includes the being restrained of liberty by petition or suggestion to the king or his Council.

(2) *Aut dissaisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis;* meaning thereby that no man shall be dispossessed "of his freehold—that is, lands or livelihood, or of his liberties or free customs—that is, of such franchises or free customs as belong to him of his free birth-

(*r*) *Cf.* writ for collection of scutage, A.D. 1235; Select Chart., 355.

(*s*) On this clause, see the papers by Sir Paul Vinogradoff and F. M. Powicke, in Magna Carta Commemoration Essays (1917), pp. 78-95, 96-121.

(*t*) [Hist. Eng., i. 219-220.]

(*u*) Hallam, Middle Ages, ii. [325].

right." The word "liberties" has various significations, as the laws of the realm, franchises and privileges bestowed by the king, and the national freedom possessed by the subjects of England: and as being opposed to this last, monopolies, in general, are contrary to the Great Charter.

(3) *Aut utlagetur, aut exuletur, aut aliquo modo destruatur.* By "outlawry" is signified the ejecting of a person, by public proclamations, from the benefit of the law, a process which, from the time of Alfred until long after the reign of William the Conqueror, was available in the case of felony only, for which the penalty was death; and therefore an outlaw, having, as it was said, a wolf's head, might be slain by any man. Early in Edward III.'s reign it was enacted that none but the sheriff should put an outlaw to death, under pain of being considered guilty of felony; the only exception was when an outlaw was slain during an attempt to capture him. By "exile" is signified the being compulsorily banished, or forced to abjure the realm. For this cause, says Coke, the king cannot send any subject of England against his will on service out of this realm, lest, under pretence of service as ambassador or the like, he might be sent into exile contrary to the Charter (*w*). "Destroyed" is interpreted to mean "fore-judged of life and limb, disinherited, or put to torture, or death, and includes every oppression against law, by colour or any usurped authority." Coke also points out that the words "in any manner" are added to the word "destroyed," and to no other in the sentence, because everything in any manner tending to destruction is prohibited; thus, if a man be accused or indicted of treason or felony, his lands or goods can neither be seized into the king's hands, nor granted, nor even promised to another, before attainder, for until attainder the accused ought to live of his own; and when a promise of the forfeiture had previously been made, it often followed that for private lucre undue means and more violent prosecution than the ordinary course of law would justify were employed.

(4) *Nec super eum ibimus nec super eum mittemus;* inadequately translated in the Statutes at large by "nor will we pass upon him, nor condemn him." Coke explains these words: "No man shall be condemned at the king's suit, either before the king in his bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus* to be understood), nor before any other commissioner or judge whatsoever (and so are the words *nec super eum mittemus* to be understood), but by the judgment of his peers—that is, equals, or according to the law of the land." But the significance of the words is brought out much more clearly by Lingard, who remarks that John had hitherto been in the habit of *going* with an armed force, or *sending* an armed force on the lands and against the castles of

(*w*) See Coke's Second Institute, i. 1-77; and Thomson, Magna Charta.

all whom he knew or suspected to be his secret enemies, without observing any form of law (*x*). The king's letters patent still exist (*y*), dated at Windsor the 10th of May, in the 16th year of his reign, about a month before the meeting at Runnymede, in which he attempted to detach the barons from the confederacy against him, by promising to them and their retainers specially what was afterwards granted to all the freemen of the realm: "Sciatis nos concessisse baronibus nostris qui contra, nos sunt quod nec eos nec homines suos capiemus, nec dissaisiemus, nec super eos *per vim vel per arma* ibimus, nisi per legem regni nostri, vel per judicium parium suorum *in curia nostra*."

(5) *Nisi per legale judicium parium suorum, vel per legem terræ.* These words, which refer to and govern all that precedes, have been variously interpreted. Coke renders them, "unless it be by the lawful judgment, that is, verdict of his equals (that is, men of his own condition), or by the law of the land (that is, to speak it once for all), by the due course and process of law." The "judicium parium" of Magna Carta is a phrase of wide signification—the enunciation of a general legal principle rather than the technical definition of a mode of trial. "It lay at the foundation of all German law; and the very formula here used is probably adopted from the laws of the Franconian and Saxon Cæsars" (*z*). But the mode of "trial by peers," with

(*x*) Lingard, Hist. Eng., iii. c. 1.

(*y*) Rot. Pat. 16 Joh. part 1. m. 3. d. n. 2. in Blackstone's Introduction to the Charters.

(*z*) Stubbs, Const. Hist., i. 577. *Cf.* the Constitution "De Beneficiis" of Conrad the Salic (A.D. 1024-1036) (Cujacius, De Feudis, lib. v., cited in Kriegel's ed. of the Corpus Juris, tom. iii., pp. 880 *seq.*). Similarly, Lothair II. declares: Sancimus ut nemo miles adimatur de possessione sui beneficii nisi convicta culpa quae sit laudanda *per judicium parium suorum* sicut supra dictum est. In the so-called "Leges Henrici Primi" (xxxi. 7), we find the same principle expressed in nearly the same words: Unusquisque *per pares suos judicandus est.* [On this point, citing the passages from Conrad and Henry I., Taylor (Engl. Const., p. 389), in a footnote says: "The judicium parium does not refer, as has been erroneously supposed, to trial by jury, but to trial by members of the feudal and county courts." *Cf.* the paper by F. M. Powicke, in Magna Carta Commemoration Essays, pp. 96 *seq.*, at p. 97. Gneist (Hist. Engl. Const., p. 247) remarks, touching this fundamental clause: "This is the assurance of the continuance of the Leges Edwardi, of the traditional judicial constitution with its legal protection accorded to person and property. By '*judicium parium*' is meant not such a jury as in the year 1215 existed only in civil procedure, in the elements of a 'jurata,' but 'judgment by peers.'" *Cf.* also Gneist, Trial by Jury (Berlin, 1849): Forsyth, Trial by Jury (2nd ed.), p. 91, note 1; and Stephen, Hist. Crim. Law, i., p. 162. Bigelow, Hist. Proced. in England (p. 155, note 3), says: "Jury trial in criminal cases had not come into use at this time, except as a matter of special grace on the part of the king." One copy has "et" for "vel," and Gneist remarks, "*vel*" in the language of this time often occurs for "et."—Ed.]

which the English people had gradually become familiarised since the Norman conquest, and which Henry II. had made the established practice in both civil and criminal causes, was that of recognition by jury. It is probable, therefore, that by "judicium parium," trial by jury—of course in that stage of development only to which it had reached in the reign of John—was specially, though not exclusively, intended. The regular holding at short intervals of recognitions of novel disseisin, mort d'ancestor, and darrein presentment, was demanded by the barons (Art. 8), and granted by the Charter (Arts 18, 19); and it is further provided that earls and barons shall be amerced only by their peers, and all other men by the equivalent jury of lawful men of the neighbourhood (Magna Carta, Arts. 21, 22). The words "judicium parium" undoubtedly included the right of the great barons, as a matter of parliamentary privilege, to be tried by their fellow barons, in all pleas of the crown, in the great court of the king. But they included also the right of every subject to be tried by a jury of his countrymen, in both criminal and civil suits. As regards civil matters, pleas between subject and subject, the general body of the freeholders were all "pares," and they could try, as jurors, any such pleas, whether the parties were barons or not; and in this case the doctrine that a baron could only be tried by his fellow barons did not apply (*a*). *Vel per legem terrae.* The "judicium parium" was not applicable in all cases, as where trial by battle was legally demanded, or judgment went by default, or where there was no question of fact but merely a demurrer raised on a question of law, all of which were proceedings "per legem terrae." In the reign of Edward III., the words were expounded by several statutes to mean "by due course of law," "by indictment or presentment of good and lawful men of the neighbourhood, or by writ original at the common law" (*b*).

(6) *Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.* "This is spoken," remarks Coke, "in the person of the king, who, in judgment of law, in all his courts of justice is present, and repeating these words; wherefore all men, for all kinds of injuries, may have justice and right, freely without sale, fully without denial, and speedily without delay." The proviso was probably mainly directed against the bribes or fines which were anciently paid to delay or expedite judicial proceedings (*c*). The words "to none will we sell" were intended to abolish the fines paid for procuring right or judgment; "to none will we deny" referred to the stopping of suits and the denial of writs; "to none will we delay" meant the delays caused either by the counter-fines of defendants (who sometimes outbid the plaintiffs),

(*a*) Reeves (ed. Finlason), i. 285.
(*b*) See especially 25 Edw. III. c. 4.
(*c*) Instances are given in Madox, History of the Exchequer, ch. xii.

or by the will of the king. This clause of the Charter, says Madox, was so far effectual that fines for law proceedings became more moderate, and the evils alluded to gradually fell into disuse. In concluding his minute illustrations of these provisions of the Charter, Coke quaintly observes: "As the gold-finer will not out of the dust, threads, or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to pass any syllable of this law, in respect of the excellency of the matter" (*d*).

IV.—*Cities, Boroughs, Commerce.*

Liberties of London, &c.

13. The city of London shall have all its ancient liberties and free customs, and so of all other cities, boroughs, towns, and ports.

33. All weirs ("kydelli"), in the Thames and Medway and throughout England shall be put down, except on the sea-coast.

The object of this was to prevent private appropriations of the right of fishing in public rivers. The removal of weirs from the Thames and Medway is directed in several ancient charters besides the present, and by many statutes (*e*).

Uniformity of weights and measures.

35. There shall be one standard of measures and one standard of weights throughout the kingdom (*f*).

Uniformity of weights and measures had been enjoined in an assize of Richard I.; and in the Articles of Visitation, issued by that king in 1194, the itinerant justices were directed to inquire "de vinis venditis contra assisam, et de falsis mensuris tam vini quam aliarum rerum" (*g*).

(*d*) Coke, Second Institute, i. 77; *cf.* Thomson, Magna Charta; Creasy, English Constitution, [ch. xi.].

(*e*) Stow, Survey, i. c. viii.; Thomson, Magna Charta, p. 214.

(*f*) ["Here," concludes Gneist, Hist. Engl. Const., p. 249, note, "can be clearly seen the influence of the city of London, which was allied with the barons and which carried the subsequent clauses relating to trade, weights and measures, as well as a special clause against the weirs made in the Thames."—Ed.]

(*g*) Hoveden, iii. 263; iv. 33. On the numerous statutory regulations of weights and measures subsequent to Magna Carta, see the Seventh Annual Report of the Warden of the Standards, 1872-1873. The law on the subject is now embodied in the consolidated "Weights and Measures Act, 1878" (41 & 42 Vict. c. 49) [as now amended by 52 & 53 Vict. c. 21, the Weights and Measures Act, 1889]. By the Weights and Measures (Metric System) Act of 1897, the use of the metric system in trade was recognised, and the penalty for its employment abolished.—Ed.]

Foreign merchants.

41. All merchants shall have liberty safely to enter, to dwell and travel in, and to depart from, England, for the purposes of commerce, without being subjected to any evil tolls, but only to the ancient and allowed customs, except in time of war. On the breaking out of war, merchants of the hostile state who may be in England shall be attached, without damage to their bodies or goods, until it be known how our merchants are treated in such hostile state; and if ours be safe, the others shall be safe also.

This provision in favour of merchants and for the advancement of trade has been justly eulogised, as showing great breadth and liberality in days when the feudal barons throughout Europe were accustomed to oppress and pillage commerce. In Henry III.'s first re-issue of the Charter, the words "nisi publice antea prohibiti fuerint" were inserted immediately after "Omnes mercatores." But such prohibition, observes Coke, must be by the common or public council of the realm, that is, by act of parliament.

V.—*Purveyance and other Royal Exactions.*

Purveyance.

28. No constable or other royal bailiff shall take any man's corn or other chattels without immediate payment, unless the seller voluntarily give credit.

30, 31. Nor shall the king, his sheriffs, or bailiffs, take any horses or carriages of freemen for carriage, or any man's timber for castles or other uses, unless by consent of the owner.

Purveyance (from *pourvoir*, to provide) was a prerogative enjoyed by the crown of "buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without the consent of the owner, and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public road . . . upon paying a settled price; a prerogative which prevailed pretty generally throughout Europe" (*h*). In Henry III.'s charters the restrictions on purveyance were modified and rendered less stringent. The abuses to which this system gave rise were manifold and grievous. The evil was never completely suppressed until the prerogative itself was resigned by Charles II. The right was even extended to men's

(*h*) Blackstone, Comm. i. 287.

labour as well as to their goods. Thus, Edward III. granted a commission to William of Walsingham, to impress painters for the works at St. Stephen's Chapel, Westminster, "to be at our wages as long as shall be necessary," and directed all sheriffs to arrest and imprison such as should refuse. Edward IV. granted a similar commission for the impressment of workers in gold for the royal household (*i*).

Bridges.

23. Neither a town nor any man shall be distrained to make bridges or banks, unless anciently and of right bound to do so.

Ferm of counties, &c

25. Counties, hundreds, wapentakes, and trethings (*ii*) shall stand at the ancient ferms, without any increase, except the manors of the royal demesne.

It was customary for the king to farm out by the year, to the highest bidder, the sheriffdoms of counties and other offices. The officials recouped themselves by the exaction of excessive fines and fees, so that the people were the real sufferers by the exaction of an increased rental.

Debts due to the Crown,

9. Land or rent shall not be seized for any debt due to the crown, so long as the chattels of the debtor will suffice; sureties shall not be distrained while the principal debtor is capable of payment, and if they have to pay, they shall be indemnified out of the lands and rents of their principal.

and to the Jews.

10, 11. Debts due to the Jews are to bear no interest during the minority of the heir of a deceased debtor; the widow shall have her dower, and pay nothing of the debt: and the children shall be provided with necessaries before payment of the debt out of the residue.

In all debts due to the Jews, the crown had an ulterior interest. They were the king's bondmen, and are so described in "Les Estatuz de Jeuerie" of Edward I.'s reign, which direct that every Jew of the age of twelve years and upwards shall pay threepence annually "de taillage au rey ky serf il est," and that they shall not pay scot or lot, or be taxed with the men of the cities or boroughs, "cum il sunt taillables al rey comes ses serfs e a nul autres for a rey" (*k*). Under the Norman and early Angevin kings the Jews were employed "as a sponge" to suck up the wealth of their subjects, and be periodically squeezed to supply the wants of the Crown. Madox (*l*) thus sums up their position

(*i*) Rymer, t. vi. 417; t. xi. 852; Hallam, Middle Ages, iii. 149.
(*ii*) [Trethings = Trithings (third parts) or Ridings.—Ed.]
(*k*) Stat. of the Realm, pp. 221, 222.
(*l*) Hist. of the Exchequer, 2nd ed., ii. 221-261.

as disclosed by the Exchequer records: "The king seemed to be an absolute lord of their estates and effects, and of the persons of them, their wives, and children. 'Tis true he let them enjoy their trade and acquests, but they seemed to trade and acquire for his profit as well as their own; for at one time or other their fortunes, or great part of them, came into his coffers." [Mr. Bridges (*m*) tells us that the "employment of Jews as an engine of taxation was far more thoroughly and systematically carried out in England than in any other country. . . . But it was not till the reign of Henry II. that the control of their affairs absorbed the cares of a special office of state. The Scaccarium Judaismi, or Exchequer of Jews, was the name of this office; it was a branch of the General Exchequer; but it was managed by its own justiciaries (at first both Jew and Christian, afterwards Christian only), who enjoyed all the immunities of barons of the Exchequer; it had branch offices in the chief cities of the realm and a numerous service of clerks and treasurers."] (*n*)

26. On the death of a tenant *in capite* of a lay fee, indebted to the crown, the sheriff or other bailiff may attach the chattels of the deceased found upon his lay fee, to the value of the debt, by the view of lawful men: and nothing shall be removed until the whole debt be paid, the surplus being left to the executors to fulfil the testament of the deceased. If nothing be found due to the king, all the chattels shall go to the use of the deceased, saving to his wife and children their reasonable shares.

The rigour with which the king's debts were exacted and levied was the subject of frequent complaints, and is strongly animadverted upon in the Mirror of Justice (*o*).

General application.

By clause 60, to which reference has already been made, all the foregoing rights and liberties granted to the king's vassals are expressly extended to the whole nation. The Charter concludes: "63. Wherefore we will and firmly

Enacting words and oath.

(*m*) The Jews of Europe in the Middle Ages, in Oxford Essays for 1857, pp. 218 *seq.*

(*n*) [Von Raumer, Geschichte der Hohenstaufen, vol. v., p. 311 and note, graphically describes the hardships suffered by Jews in England under John and Henry III., and notes that, in addition to the heavy exactions to which they were subjected by these sovereigns, they were on the other hand persecuted by the seditious barons because they had paid moneys to the kings. *Cf.* Matth. Paris, 108-111. All contracts of debt due to Jews were to be in writing, drawn out in several copies and examined by two Jews, two Christians, and two public officers, and then filed. Rog. Hov. 745. For the "Exchequer of Jews," *cf.* also Gneist. Hist. Engl. Const., 186, note.– Ed.]

(*o*) Cap. v., s. 21, art. xxvii.

enjoin that the Church of England be free, and that all men in our kingdom have and hold the aforesaid liberties, rights, and concessions, well and in peace, freely and quietly, fully and wholly, to them and their heirs, of us and our heirs, in all things and places for ever as aforesaid." This is followed by the oath to be taken by the king and the barons, mutually to observe all the articles of the Charter, in good faith and without evasion.

Temporary provisions.

Clauses 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, and 62 have been omitted from this summary, as being mainly of a special and temporary character. They relate principally to the reform of the forests, the surrender of charters and hostages placed in the king's hands as securities, the dismissal of his foreign servants and mercenary troops, the rights of the Welsh and of the King of Scots, and the grant of a general political amnesty.

Mode of enforcing the Charter.

There remains only the 61st clause, by which means were provided for enforcing the due observance of the Charter. The question, how should the compact between the king and his people be enforced, was at once difficult and pressing. The king was left in possession of the regal power and dignity; experience had shown the ease with which former sovereigns had broken their most solemn written engagements; and the insincerity of John was notorious. At this period there were no effective constitutional checks against the king; and so a rude device was hit upon, in its nature really impracticable, by which John granted, in effect, to all his subjects a qualified liberty of rebellion.

The twenty-five Conservators.

The whole baronage were to elect a Council of twenty-five barons charged to take care with all their might that the provisions of the Charter were carried into effect. If the king or any of his officers should violate the Charter in the smallest particular, these barons, or four of their number, were to complain to the king, or in his absence to the justiciar, and demand instant redress. If no redress be given within forty days, "the said five-and-twenty barons, together with the commonalty of the whole land (*communa totius terræ*), shall distrain and distress us in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed

The national unity recognised.

according to their pleasure, saving harmless our own person and the persons of our queen and children; and when it is redressed they shall obey us as before. And any person whatsoever in the land may swear that he will obey the orders of the five-and-twenty barons aforesaid in the execution of the premises, and will distress us, jointly with them, to the utmost of his power; and we publicly and freely give liberty to any one that shall please to swear this, and never will hinder any person from taking the same oath. As to all those in the land who will not of their own accord swear to join the five-and-twenty barons in distraining and distressing us, we will issue orders to make them take the same oath as aforesaid" (*p*).

John attempts to evade the Charter.

John soon gave evidence of his intention to break from the Charter if he could. He applied for aid to the Pope, now his suzerain, who declared the Charter void (*q*), excommunicated the barons, and suspended Archbishop Langton. The city of London also, which had ardently supported the barons in their demands, and whose mayor was one of the council of twenty-five executors, was laid under interdict. In addition to these spiritual arms, John sent for a body of mercenaries and renewed the civil war. The mercenaries, as professional soldiers, proved themselves an overmatch for the barons with their half-trained retainers. In this extremity, the barons determined to renounce their allegiance to John and to dethrone him by the aid of Louis, eldest son of Philip Augustus of France, to whom they made a formal offer of the English crown (*r*). Louis at once send aid to the barons, and himself landed in England on May 21, 1216. But for John's unexpected death, on

The barons offer the crown to Louis of France.

Death of John, Oct. 19, 1216.

(*p*) ["This clause is so far in harmony with the spirit of the feudal state of the Middle Ages, as it was based upon a mutual relation or feudal protection and fealty, that is upon compact." Gneist, Hist. Engl. Const., p. 251; and again: "A contractual right of distress was so bound up with the legal customs of the Middle Ages that the Committee of Resistance almost lost thereby its apparently revolutionary character."—Gneist, The Engl. Parliament, p. 85.—Ed.]

(*q*) [*Cf.* Rymer, i. 2, p. 67, fol.; Foedera, i. pp. 203, 204. See the paper by G. B. Adams, Innocent III. and the Great Charter, in Magna Carta Commemoration Essays (1917), pp. 26-45—Ed.].

(*r*) Ann. Waverl. 283; Rymer, i. 140; Matt. Paris [Chron. Maj., ed. Luard, ii. 647].

October 19 following, it is highly probable that a change of dynasty would have been carried out.

HENRY III.

At the death of John things looked bad for the succession of his son Henry, then only nine years old. Louis was in the south, the Scots in the north, as enemies, and the Welsh march was for a time the only place of refuge for the Angevin dynasty. Without delay, on October 28, 1216, the boy Henry was crowned at Gloucester by the papal legate Gualo (*s*); and William Marshal, Earl of Pembroke, assumed, with the assent of the friendly barons, the title of *Rector Regis et Regni*. The regent, by his politic conduct, contrived, within the space of a twelvemonth, to bring over the disaffected baronage to the king's side, and to induce Louis, after the "Fair of Lincoln" (May 29, 1217), and the loss of his reinforcements in the naval engagement off Dover (August 24), to abandon his pretensions to the English crown.

Henry III.'s First Charter, 1216.

One of the first acts of the Earl of Pembroke had been to renew the Great Charter at a meeting of the royalist prelates and barons held at Bristol on November 24, 1216, a few weeks after John's death. The alterations in the re-issue are numerous. The merely temporary provisions of John's Charter were omitted as a matter of course. But there were also omitted the 12th and 14th clauses, forbidding the levying of extraordinary aids without the consent of the *Commune Concilium regni*, and regulating the mode in which that Council was to be summoned, as well as all other clauses which in any way restricted the king's power to increase his revenue. In clause 42 of the re-issue the king's ministers assign as their reason for the omission that these articles being "gravia et dubitabilia,"

(*s*) [As regards this vexed question of the crowning by the papal legate, *cf.* Stubbs, Const. Hist., ii. p. 18, note: "According to the annals of Tewkesbury, Gualo placed the crown on Henry's head, p. 62; see also Ann. Winton, p. 83: Ann. Wigorn. p. 407; and the same might be inferred from the royal letter announcing the issue of the Charter: Foedera, i. 145. But the coronation, although performed under Gualo's authority, which was necessary in order to overrule the protests of the Westminster and Canterbury monks, was solemnised by the English bishops, Winchester, Bath, Worcester, and Exeter (Ann. Dunst., p. 48). M. Paris, iii. 2; and Wykes (p. 60) mention that the legate did not even put his hand to the crown." —Ed.]

the prelates and barons had thought it best that the consideration of them should be respited until such time as, together with such other things as pertained to the welfare of all, they could be fully considered and established. The 42nd clause of John's Charter, in restraint of the king's prerogative to prevent any of his subjects from quitting the kingdom, and the 45th, as to the qualifications of the king's justices, were also left out. The alterations in the feudal clauses are characterised by the greater authority conceded to the mesne lords over their sub-vassals, a retrograde policy which was probably dictated by a desire to conciliate the baronage (*t*).

Henry III.'s Second Charter, and Charter of the Forest, 1217.

In the following year (1217), after Louis had finally quitted the kingdom, the Great Charter was again re-issued, with many further important omissions, alterations, and additions (*u*). The forest clauses, which had been retained in the preceding Charter, were now omitted, being embodied in the Charter of the Forest, which was issued about

Omissions.

(*t*) A duplicate of Henry III.'s first charter was transmitted to Ireland, under the seals of the legate and the protector, for the benefit of the king's faithful subjects there, with some few alterations which the local necessities of that island required.—Blackstone, Introduction to the Charters.

(*u*) ["Three articles (61, 12, and 14) were sacrificed, which contained the first basis of a constitution of estates of the realm."—Gneist, Hist. Engl. Const., 256. *Cf.* also Select Charters, 2nd ed., p. 344.—Ed.]

The Forest Charter.

(*w*) No Forest Charter was issued by John separately from the Forest clauses (44, 47, 48) of Magna Carta. By these, in addition to the abolition of compulsory attendance at the Forest Court already referred to, all forests made during John's reign were deafforested; a searching inquiry into the Forest usages to be made by an inquest of twelve sworn knights was promised, and all bad customs were at once to be abolished. The first Forest Charter was issued by the Earl of Pembroke, in Henry III.'s name, on November 16, 1217. It contains seventeen articles, by which the most grievous burdens of the Forest laws, as formulated by Henry II. in the Assize at Woodstock, 1184, were either repealed or mitigated. The forests were still suffered to remain "an oasis of despotism in the midst of the old common law"; but the restriction on the jurisdiction of the Forest Courts imposed by the 44th clause of John's Charter was maintained, and all lands afforested by Richard and John were to be at once disafforested, as well as such lands afforested by Henry II. as were not within the bounds of the Royal demesne. The penalty of death or mutilation was forbidden for the future, fine, imprisonment, or banishment from the realm being substituted (art. 10); but the cruel mutilation of dogs, in order to prevent them from being used in hunting, was expressly retained and regulated (three claws of the forefoot were to be cut off). See the Charter of the Forest, and the Assize of Woodstock, with which it should be compared, in Select Chart., 150, 339.

the same time (*w*). The respiting clause (42) was also left out, provision being made in this and the Forest Charter for several of the matters previously respited, and as to the other matters, their absence was to some extent supplied by a new clause in this re-issue (46), saving all existing liberties and free customs. The chief alterations are: In the "essential clauses" of John's Charter (39, 40), the words already referred to (*x*) were added, apparently for the sake of greater accuracy; and, probably, as a concession to the old feudal party, who regarded with dislike all extension of the central royal jurisdiction, the assizes of the itinerant justices were reduced from four to one annually; and the direction for the election by each county of four knights to take the recognitions is omitted, the knights of the county generally being substituted. Alterations.

In addition to the 46th, the other new clauses in Henry's second Charter are the 39th, 42nd, 43rd, 44th, and 47th. By clause 39 land was forbidden to be aliened by gift or sale, unless sufficient were retained to answer for the services due to the superior lord of the fee (*y*). The 42nd directs that the county court shall be holden but from month to month, the sheriff's Tourn but twice in the year, and the view of frankpledge at Michaelmas; regulations probably dictated by the jealousy of the feudal lords exercising local franchises. New clauses: Alienation of land. County Court. Sheriff's Tourn. Frankpledges.

The 43rd restrains fraudulent gifts in mortmain to religious corporations: "It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house; nor shall it be lawful to any religious house to take the lands of any, and to leave the same to him of whom he received it. If any from henceforth give his lands to any religious Mortmain.

(*x*) See *supra*, p. 113.

(*y*) This prohibition applied both to tenants *in capite* and to tenants of mesne lords. It was doubted whether tenants *in capite* could aliene any part of their lands without the royal licence, but by statute 1st Edward III. c. 12, it was declared that the king should not hold such lands as forfeit, but that a reasonable fine should be paid into the Chancery. With regard to tenants of mesne lords, this prohibition of Magna Carta was repealed by the statute *Quia Emptores*, 18th Edward I., which put a stop to subinfeudation and gave free liberty of alienation in whole or in part, with reservation of the services to the superior lord of the fee. *Supra*, p. 59.

house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee" (*z*).

Scutage.

Adulterine castles to be demolished.

The 44th clause asserts the king's right to scutage "sicut capi consuevit tempore Henrici regis avi nostri"; and the 47th directs the immediate destruction of the "castra adulterina" (a phrase forcibly recalling the disorders of Stephen's reign), either erected or rebuilt since the commencement of the barons' war.

Henry III.'s Third Charter, 1225.

In the ninth year of his reign, Henry, who was now declared of age, re-issued Magna Carta and the Charter of the Forest, in consideration of the grant of an aid of a "fifteenth." They contained only two alterations of importance: (1) In the preamble, the words "spontanea et bona voluntate nostra" were substituted for the "consilio"; a change which, though capable of being interpreted as an assertion on the king's part of his independence of the counsel of his baronage, was, with greater probability, intended to obviate any subsequent evasion by him on the ground that his former charters, having been granted by others in his name during his minority, were no longer binding on himself (*a*). (2) A final clause was added specifying the grant of the "fifteenth" as the price of the king's concession: "And for this our gift and grant of these liberties and of other liberties contained in our

Mortmain.

(*z*) The term "mortmain," *in mortua manu*, applies generally to alienations of lands or tenements to *any* corporation, sole or aggregate, ecclesiastical or temporal; but it is used specially with reference to religious houses, whose enormous acquisitions of landed property and subtle evasions of the law gave rise to a series of restraining enactments. The earlier measures seem to have been specially directed against the fraud so frequently committed upon the feudal lords by pretended and colourable donations to religious houses with the intention of receiving the lands back again freed from the feudal obligations. Henry II. endeavoured to check this abuse by exacting scutage and the other feudal dues from the lands held in chief by the clergy (Const. of Clarendon, c. xi.); and the present clause of the Great Charter seems to refer to fraudulent as opposed to innocent alienations. But its effect, as expounded in the following reign by the statute *de Religiosis*, 7th Edward I., was to prohibit gifts of land to religious houses generally—*i.e.*, even in cases where the religious house did not give the land back to hold of the house, but kept it in its own hands. The clerical evasions of this statute were successively and at length effectually met by the 13th Edward I. (Westminster II.) and the 15th Richard II. c. 5.—Coke, 2 Inst. 74; Reeve (ed. Finlason), i. 274). [*Cf.* Taylor, Engl. Const., p. 407. —Ed.]

(*a*) Ann. Dunstapl., p. 93, *s. a.* 1225; Select Chart., 314.

charter of liberties of the forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and all our subjects have given unto us the fifteenth part of all their moveables. And we have granted unto them for us and our heirs that neither we nor our heirs shall procure or do anything whereby the liberties in this charter contained may be infringed or broken: and if anything be procured by any person contrary to the premises, it shall be had of no force nor effect" (*b*).

Confirmations of the Charter.

It is in the form in which it was promulgated in the ninth Henry III. that Magna Carta was confirmed by Edward I. in the twenty-fifth year of his reign. The copy which heads our statute book is taken from an *Inspeximus* of the Charter, so called from the letters patent prefixed in the name of Edward I., "Inspeximus Magnam Chartam domini Henrici quondam regis Angliae patris nostri de libertatibus Angliae in haec verba." Regarding the Charter as the palladium of the nation's liberties, the people for centuries were ever ready to purchase its confirmation from successive kings by the grant of a liberal subsidy. In this way it was solemnly confirmed no less than thirty-seven times down to the second year of Henry VI. (*c*).

(*b*) Stat. of the Realm, Charters of Liberties, 22-25.

(*c*) The Charter was confirmed:

6	times by Henry III.	6	times by Henry IV.
3	,, Edward I.	Once	by Henry V.
14	,, Edward III.	,,	Henry VI.
6	,, Richard II.		

[The literature relating to Magna Carta has been increased by the contribution of W. S. McKechnie, Magna Carta (Glasgow, 1905). The author acknowledges the great claims of von Gneist as a leading authority, but combats, pp. 129 *seq.*, his arrangement of the chapters of Magna Carta into five groups (see Gneist, Const. Hist., cap. xviii.) according as they place legal limitations (1) on the feudal military power of the Crown, (2) on its judicial power, (3) police power, (4) financial power, or (5) furnish legal sanction for the enforcement of the whole. The adoption of such a principle of classification with reference to a period when the various functions of the Executive were blended together, is somewhat, he urges, of an anachronism. W. S. Holdsworth, Hist. Engl. Law, vol. ii. pp. 165-172; and see also Anson, The Law and Custom of the Constitution (1907), vol. ii. pt. i. pp. 14 and 15, who remarks, "Many things have been read into the Charter of which its framers never dreamed. . . . But after making all due allowance for the exaggeration of political enthusiasts, the Charter stands out as a formulated definition of liberties to which every freeman could refer for proof of his

right to freedom from arbitrary taxation and arbitrary punishment." An excellent contribution to the study of the English Charters is a collection by C Bémont, Chartes des libertés anglaises, 1100-1305 (Paris, 1892). It contains a rich catalogue of names, subjects, and words. The kernel of the whole forms the Magna Carta, which is led up to by three charters of the twelfth century. The Introduction shows the significance of the Charter, and the author increases our knowledge of the English constitution in all its bearings during the thirteenth century from most recent sources. The most recent addition to the literature on Magna Carta is the publication already mentioned containing contributions by various writers : Magna Carta Commemoration Essays, ed. by H. E. Malden (London, 1917).—Ed.]

CHAPTER V.

ADMINISTRATIVE SYSTEM UNDER THE NORMAN AND PLANTAGENET KINGS.

The king as centre of administration.

At the head of the whole administrative system was the king himself, personally taking part not only in legislation but in fiscal, judicial, and every other kind of executive business (*a*). It was not till long after the conquest that the kings of the English ceased, occasionally at least, to attend and take part in the proceedings of their courts of law. Henry II. was accustomed to assist in dispensing justice both in the Curia Regis and in its financial committee the Exchequer (*b*). Some of his sayings on the judgment-seat have been preserved. In a case tried before him, shortly after his accession to the throne in 1154, the defendant alleged that a charter of Henry I. produced in evidence had been improperly obtained. "Per oculos Dei," exclaimed the king, taking the charter into his own hands, "si cartam hanc falsam comprobare posses, lucrum mille librarum mihi in Anglia conferres" (*c*). In another case, a dispute, between Baldwin, Archbishop of Canterbury, and the Abbot of St. Edmund as to a territorial franchise, we are told that the king, puzzled by the production of conflicting charters, declared "Nescio quid dicam: nisi ut cartae ad invicem pugnent." And when the archbishop subsequently refused to accept the abbot's offer to submit the dispute to the verdict of the counties of Norfolk and

The king as judge.

(*a*) *Cf.* Stubbs, Const. Hist., i. 365; [Gneist, Engl. Const., cap. 16, p. 201.]

(*b*) Dial. dê Scac., i. c. 4.

(*c*) *Walter, Abbot of St. Martin of Battle* v. *Gilbert de Balliol* (Chron. Monasterii de Bello, 106; Bigelow, Placita Anglo-Normannica, 175). This case is interesting for the light which it throws alike on the working of the feudal tenures, the system of judicature, and the social aspects of the twelfth century.

Suffolk, the king angrily arose and left the court, saying, "Qui potest capere capiat" (*d*). King John personally decided a case in the Exchequer in the sixth year of his reign. Henry III. frequently sat in Westminster Hall with his judges; and several instances are recorded of criminal jurisdiction exercised in person by John, Henry III., Edward I., and Edward II. (*e*).

Still the exercise of ordinary jurisdiction by the king was an exception to the general rule. Edward IV., we are told, sat in the King's Bench for three consecutive days, in order to see how his laws were executed, but it is not said that he interfered in the proceedings (*f*). By the usage of many centuries it has now been long an undisputed principle that, although the king should be present in a court of justice, he is not entitled to "determine any cause but by the mouth of his judges, to whom he has committed the whole of his judicial authority" (*g*). When James I. sat personally in court, and wished to interfere, he was told by the judges that he could not deliver an opinion (*h*).

The Justiciar.

Next to the king in power and authority was his chief minister, the justiciar, the supreme administrator of law and finance. He was "the greatest subject in England," the representative of the king in all matters, and by virtue of his office, lieutenant, viceroy, or regent of the kingdom during the king's absence. The justiciar was, as we have seen (*i*), a new officer appointed by the Conqueror, not only

(*d*) *Archbishop of Canterbury* v. *Abbot of St. Edmund. Circa* A.D. 1186. Chron. Jocelin de Brakelonda, p. 37 (Camden Soc.); Bigelow, Placita Anglo-Normannica, 238.

(*e*) Allen on the Royal Prerogative, 92; Madox, Hist. of the Exch., i. 191; Dialogus de Scacc., l. i. c. 4; Palgrave, Eng. Com., i. 292. In early times even queens-consort sometimes sat in court. Matilda, in the absence of William the Conqueror, held pleas in person in the County Court (Domesday. Heming, p. 512; "coram Regina Matilda in praesentia iv. vicecomitum"). The "good Queen Maud," wife of Henry I., was present at a trial in the Exchequer between the men of Periton and the Abbot of Abingdon (Hist. Mons. Abingd., ii. 116 [Rolls Ser.], Bigelow's Plac. Ang. Norm., 99.) Henry III.'s queen also held pleas in person (Spence, Equit. Jurisdiction, 101, n.).

(*f*) Stow, Chron., 416 (1631). [Foss, iv. 215.—Ed.]

(*g*) Coke, 4th Inst., 73.

(*h*) Blackstone, iii. 41.

(*i*) *Supra*, p. 68.

to carry on the government during his frequent absence from England, but at all times to relieve him from the pressure of the vast amount of business which the government of that newly-acquired dominion involved. The justiciar, in short, stood to the king in the whole kingdom in the same relation as the sheriff did in each shire (*k*). The dignity of the justiciar's office remained unimpaired until the death of King John, when Hubert de Burgh, the justiciar, being besieged in Dover Castle, the barons who proclaimed Henry III. constituted the Earl of Pembroke "*Rector regis et regni*," De Burgh still retaining his office. In 1241 the Archbishop of York was appointed regent during Henry's absence in Poitou, without the title of justiciar. But the office was still considered of such importance that in 1258, in the "Mad Parliament" at Oxford, the barons demanded that the justiciar should be annually chosen with their approbation. At length Edward I. dispensed with the office altogether; and the chancellor, who now entered into many of the rights and dignities formerly enjoyed by the justiciar, became the principal minister.

The Chancellor.

The title of chancellor was introduced into England under Edward the Confessor, as the designation of the official keeper of the royal seal and chief of the king's

(*k*) [The Norman system of jurisprudence, unlike the Anglo-Saxon system, which was based on self-government and involved the total administration of justice in civil and criminal cases and excluded all right of appeal save to the clemency of the Crown, was eminently a centralised system, at the head of which was the chief justiciar, who was not only the chief magistrate, but the king's lieutenant throughout his kingdom, and his viceroy during the royal absences from the realm. The colleagues on the bench of the chief justiciar, but subordinate to him, were the chancellor, barons, ecclesiastics, and other learned persons from time to time summoned to give assistance. The court thus constituted was called indifferently the *Curia* or *Aula Regis*. *Cf.* Hallam, Middle Ages, 11th ed., vol. ii., p. 281, and F. A. Inderwick, The King's Peace, pp. 45 *seq.*—Ed.]

Stubbs, Sel. Chart. Introd. Sketch, 16. "The growth of [the justiciar's] functions was gradual, and even the history of the title is obscure. . . . The office first appears as the lieutenancy of the kingdom or vice-royalty exercised during the king's absence from England. In this capacity William Fitz-Osbern, the steward of Normandy, and Odo of Bayeux, acted during the Conqueror's visit to the continent in 1067. . . . It would seem most probable that William Fitz-Osbern, at least, was left in his character of steward, and that the Norman seneschalship was thus the origin of the English justiciarship."—Const. Hist., i. 374.

chaplains. With the chancellor at their head, the king's chaplains, like the "clerks of the palace" of the Frankish monarchs, formed a select body of scribes or secretaries, who, under the justiciar, drew up and sealed the royal writs, conducted the king's correspondence, and assisted the treasurer in keeping the royal accounts (*l*). Under the Norman kings the office of chancellor, though dignified and important, was thrown into the shade by the justiciarship. From the time of Becket, however, the chancellorship appears to have steadily advanced in dignity until, on the abolition of the office of justiciar, it attained, as we have seen, the foremost rank.

The *Curia Regis*.

The term *Curia Regis*, in its widest signification, and early use under William the Conqueror and William Rufus, seems to have denoted the National, Common, or Great Council of the Realm—the witenagemot in its feudalised form—at the threefold sessions of which the bishops and earls and all tenants-in-chief had the right of attending. In addition to its political function of giving "counsel and consent" to legislative changes and other acts of national import, the Curia, in its judicial aspect, was invested with the old appellate jurisdiction of the witenagemot, and with a direct jurisdiction, as the feudal court of the king's vassals, in all disputes between the tenants *in capite*. From the reign of Henry I. at the latest, the judicial functions of the Common Council of the Realm appear to have been exercised by a supreme court of justice, to which the name Curia Regis is specially, though as yet not exclusively, appropriated, and which is attendant upon the king in his movements from place to place. It is presided over by the king, or in his absence by the justiciar, who was assisted in the performance of

(*l*) Palgrave, Eng. Com., i. 177. "The name, derived probably from the *cancelli*, or screen behind which the secretarial work of the royal household was carried on, claims a considerable antiquity; and the offices which it denotes are various in proportion. The Chancellor of the Karolingian sovereigns, succeeding to the place of the more ancient *referendarius*, is simply the royal notary: the archi-cancellarius is the chief of a large body of such officers associated under the name of the Chancery, and is the official keeper of the royal seal. It is from this minister that the English Chancellor derives his name and function."—Stubbs, Const. Hist., i. 380-381. (But *cf.* especially Gneist, Const. Hist. of Engl., pp. 218-219, and references cited.—Ed.]

his duties by a staff of officials composed of those barons who were attached to the royal household, such as the constable, marshal, chamberlain, steward, and treasurer, together with the chancellor and other persons selected by the king as being specially qualified by their legal knowledge to act as judges (*m*). This court possessed originally all those different powers which were subsequently distributed among the three courts of the King's Bench, the Common Pleas, and the Exchequer. In the Curia Regis were discussed and tried all pleas immediately concerning the king and the realm: it superintended the assessment and collection of the royal revenue: decided all appeals: and to it suitors were allowed, on payment of a fine, to remove their plaints from the older but inferior courts of the shire, the hundred, the manor and the borough (*n*). The exact relation of the Curia Regis thus constituted as a court of justice, to the Curia Regis in its wide signification as the National Council, is admittedly obscure: nor can we expect to find clearness of definition and limitation at a period when the machinery of government was undergoing a process of transition and development. Practically, however, the King's Court exercised the judicial powers of a permanent committee of the National Council (*o*), consisting mainly of the great officers of the king's household, and strengthened by the addition

(*m*) On the origin of the great officials of the household and the state, see Stubbs, Const. Hist., i. 372 *seq.* [and Gneist, cap. xvi: The Curia Regis-The Great Officers of State.—Ed.]

(*n*) Hardy, Introduction to Close Rolls, p. 23.

(*o*) Bigelow, Hist. Proc. Eng., p. 76, disputes this, saying that the use of the expression Committee of the Witenagemot, or Great Council, for the King's Court is "so inapt and misleading that no consideration even of convenience should permit its use." This is a much disputed point: but the author appears, in spite of the objection to the expression "Committee of the National Council," to be right for all practical purposes. It may be doubted, however, whether it was in any sense "permanent." Gneist (Hist. Engl. Const., cap. xvi.) refers to the Curia Regis under three headings: (1) The Curia considered as the Norman Court Days; (2) The Curia Regis as a constitutional Central Court of Law; and (3) "A" Curia Regis considered as a Supreme Government Council, and remarks, p. 214, "There existed at every point of time a sort of 'Conseil du roi,' which the feudal language designed as the 'Curia Regis,' but which varied every day according to the will of the king." This complex and much debated question is discussed at length by L. O. Pike Constitutional History of the House of Lords, chap. iv.—Ed.]

of other officials specially qualified for the position of judge (*p*).

Fiscal administration.

The Exchequer.

The administration of the justiciar was first systematically organised under Henry I., by Roger, Bishop of Salisbury, the founder of a family of officials. From the reign of that king, at the latest, a committee or branch of the Curia Regis was specially devoted to fiscal matters, and when so employed, sat in the chamber and was known by the name of the Exchequer (*Curia Regis ad Scaccarium*) (*q*). Twice in each year, at Easter and Michaelmas, every sheriff was bound to appear at the Exchequer in the Palace at Westminster and account for the sums due from his shire. These were mainly of two kinds: (1) The ancient national payments (which required no new authorisation), consisting of (a) the ferm of the shire, that is the rent (formerly paid in kind, now commuted for fixed sums) from public land and royal demesnes—the old folkland now become *terra regis;* (b) danegeld, "the ship-money of those times," a tax of two shillings on every hide of land, originally imposed under Ethelred II., to raise a tribute exacted by the Danes, and by the Norman kings, turned into a permanent contribution for the public defence (*r*); (*c*) the fines of local courts - the old English *wite* payable to the king. (2) The new feudal aids, reliefs, and other payments, for which also no authorisation of parliament was required unless when some extraordinary gift was demanded. In addition to these sources of revenue the demesne lands of the king

Sources of revenue.

(*p*) Besides being applied to the National Council, and the Supreme Court of Justice, the term *Curia Regis* was also employed to denote the King's Continual, Ordinary, or Select Council.

(*q*) The members of the Curia were all termed justices, their head being the *capitalis justiciarus;* but in the Exchequer they were called barones, or *barones scaccarii*, a title which they retained after the Court of Exchequer had come to be filled with mere lawyers not chosen from the baronage. Hallam, Midd. Ages, ii. 423. The Exchequer derived its name from the "chequered cloth which covered the table at which the accounts were taken, a name which suggested to the spectator the idea of a game of chess between the receiver and the payer, the treasurer and the sheriff."—Stubbs, Const. Hist., i. 407. [Dialogus de Scaccario, i. 1. *Cf.* Gneist, Hist. Engl. Const., cap. xiv; Maitland, Const. Hist. pp. 62-64.—Ed.]

(*r*) The latest instance of its payment is in the 20th of Henry II.; but Richard I. practically revived it under the disguise of a "carucage," or land-tax.

and the towns were liable to talliage, which was arbitrarily exacted without the consent of parliament, until the right was surrendered by Edward I. (*s*). No inconsiderable income was also received by the Exchequer from the fines and other proceeds of the "pleas of the crown," from the amercements payable in respect of a large class of small offences of commission or omission, and from the fines paid to the king by the parties to suits at law, either by the plaintiff to obtain speedy judgment, or by the defendant in order to delay or put an end to further proceedings.

Changes in taxation under Henry II.

Henry II., the first of the Angevin or Plantagenet dynasty, introduced important changes in taxation. All classes of the people and all kinds of property were brought under contribution. His scutage was a new land tax imposed upon the tenants in chivalry, clerical as well as lay, and rated, not upon the ancient basis of the hide, but upon the *scutum*, or knight's fee (*t*). Danegeld, after the king's dispute with Becket, was allowed to drop out of the fiscal system, but only to be almost immediately revived under the name of *donum* or hidage. Under Richard I., it became the "carucage," a tax levied upon all holders of land of whatever tenure. But Henry's most important innovation was the taxation of income and personal property, which, as we have seen (*u*), were made contributory for the first time by his ordinance of the Saladin Tithe in 1188. The practice, when once introduced, was speedily extended and permanently retained. For the ransom of Richard I. in 1193, every person in the realm was called upon to pay one-fourth of revenue or goods. King John exacted, in 1203, a seventh of the

Taxation of personal property.

(*s*) Hallam, Midd. Ages, ii. 318; Stubbs, Select Chart., Introductory Sketch, 18.

(*t*) On the disputed extent of the Anglo-Saxon "hide," see Kemble, Saxons, i. 88 *seq.*, who makes it about thirty-three acres; and G. L. von Maurer, Einleitung, 126-134. It is agreed that the latter hide was one hundred or one hundred and twenty acres. The quantity of land constituting a knight's fee was not uniform. It probably varied with the value. The usual value requisite for a knight's fee was £20, *temp.* Edw. I. (Parl. Writs, i. 214), and the amount had probably been the same from the introduction of the tenure.

(*u*) *Supra*, p. 91.

movables of his barons, and in 1207 a thirteenth from the whole people (*w*). It was only after taxation had been remodelled, and systematically extended, under the first Angevin kings, to all classes of men and all kinds of property, personal as well as real, that any serious opposition, first by the clergy and then by the rest of the nation, began to make itself felt. In the pre-Norman period the right of the National Council to consent to the imposition of taxes was undisputed, although rarely called into exercise. By the theory of the feudal system, also, the taxpayer "made a voluntary offering to relieve the wants of his ruler." Now that taxation had again become national, and was pressing heavily upon all classes, it became necessary to re-assert the ancient right of the nation to give its counsel and consent. The process by which the bulk of the feudal vassals exchanged their theoretical right of personal consent for the practical right of granting taxes by their representatives, in an assembly which represented not merely the landowners, but all sections of the nation, will be discussed later on when treating of the origin and growth of parliament.

Fines *pro respectu militiae* enforced by Edward I.

Edward I. employed an expedient for raising money without the consent of parliament, analogous to the institution of scutage by Henry II. It was one of the liabilities of a tenant by knight-service to be obliged, on attaining full age, to receive the order of knighthood, and to provide himself with the arms and equipments appropriate to that dignity. Henry III., in 1224, had directed the sheriffs to enforce this obligation against all lay holders of a knight's fee (*x*); an order which was repeated in 1234 as to tenants *in capite* only (*y*). In 1278, Edward I., being pressed for funds, issued stringent orders

(*w*) In subsequent times a "fifteenth" of the value of every man's chattels became the usual grant. From the 8th Edward III. a "fifteenth" signified a fixed sum according to an assessment of the value made in that year upon all the cities, boroughs, and towns of England. Under Richard II. the old scutage, hidage, and talliage began to be replaced by the "subsidy," a property tax of 4*s.* in the pound for land and 2*s.* 8*d.* in the pound for goods. Like the "fifteenth" the "subsidy" also became a fixed amount; one "subsidy" = £70,000.

(*x*) Rot. Claus., ii. 69.

(*y*) Royal Letters [Hen. III.], i. 456.

to the sheriffs to compel all persons, as well tenants of mesne lords as tenants-in-chief, who held land to the value of £20 a year, or one whole knight's fee of the same annual value, and who ought to be knights, to take up their knighthood (*z*). Those who preferred to pay a fine *pro respectu militiæ* were excused. The distraint of knighthood was not merely a method of raising money; it was also intended to effect the military object of augmenting the knightly body from competent freeholders, who were neither tenants-in-chief nor tenants in chivalry, thus forming a link between the feudal force and the old national militia; and politically it tended to weaken the influence which the baronage derived from the mesne tenures (*a*). But the early abuse of this prerogative is shown by the institution in 1274 of an inquiry into the misconduct of the sheriffs and others in reference to the compulsory knighthood (*b*), and by the remedial statute *De militibus* passed on the accession of Edward II. It was enacted that tenants whose lands produced £20 a year, or who were under age, or in holy orders, or whose lands were held by socage or burgage tenure, should not be compelled to receive knighthood; and that other persons, if of great age, afflicted with bodily injury or incurable disease, or burdened by the charge of children or by suits, should be excused on payment of a *reasonable* fine (*c*). This mode of raising money without the consent of parliament was vexatiously employed in later times by Edward VI., Elizabeth, and Charles I. It was abolished, with the other incidents of feudal tenure, by the Act of Charles II. (*d*).

Edward II. statute *De militibus*.

Besides the various forms of direct taxation under the Norman and early Angevin kings, the prisage of imported wines and the customs duties on certain other imports and exports (based upon the ancient right of levying toll, which in some places was exercised even by the lords of manors), formed the nucleus of a system of indirect

Indirect taxation.

(*z*) Palgrave's Parl. Writs, i. 214.
(*a*) See Stubbs, Const. Hist., ii. 115, 294.
(*b*) Rymer, i. 517.
(*c*) 1 Edw. II. stat. 1.
(*d*) 12 Car. II. c. 24.

taxation which gradually grew up with the expansion of commerce and the increasing pecuniary necessities of the crown. The early abuse of the king's claim to customs is shown by the provision in Magna Carta (c. 41), that merchants may buy and sell *sine omnibus malis toltis, per antiquas et rectas consuetudines*. The constitutional aspect of the later struggles between the king and the parliament on the subject of indirect taxation will be discussed hereafter.

JUDICIAL SYSTEM.

Down to the reign of Henry II. the Curia Regis still continued as the one supreme court, of which some of the judges, selected from time to time out of the whole body, and varying in number and combination, held a practically continuous session at the Exchequer for all financial business. Under Henry II. more especially during the decade beginning with the Assize of Clarendon in 1166 and ending with the Assize of Northampton in 1176—the great increase in the business of the Curia, both in its central sessions and on its fiscal and judicial circuits, caused the staff of judges to be gradually augmented to eighteen. But in the year 1178, the king, finding this number too great, reduced the judges in the Curia from eighteen to five (two clerics and three laymen); and at the same time deprived the court of its character of a court of final appeal, by reserving to his own hearing in council causes in which the Curia should fail to do justice (*e*). From this limited tribunal, which from the following year held regular sessions *in banco*, nominally but not actually *coram rege*, sprang the courts (now divisions) of King's Bench and Common Pleas. Being still, in theory, held *coram rege*, the Curia continued, as of old, to follow the king's person; but this practice being found productive of great inconvenience to both suitors and witnesses, it was provided by Magna Carta that common pleas—civil suits between private individuals—should be separated from the other business of the Curia and fixed at Westminster (*f*).

Changes in the Curia Regis under Henry II.

Later division into three Courts.

Not long after the granting of Magna Carta, the Curia Regis was permanently divided into three committees or

(*e*) Benedict. Abbas, i. 207.

(*f*) Mag. Cart., c. 17, *supra*, pp. 106, 107.

courts, each taking a certain portion of the business: (1) Fiscal matters were confined to the Exchequer; (2) civil disputes, where neither the king's interest nor any matter savouring of a criminal nature was involved, were decided in the Common Pleas; and (3) the court of King's Bench retained all the remaining business and soon acquired the exclusive denomination of the ancient Curia Regis (*g*). But the same staff of judges was still retained for all three courts, with the chief justiciar at their head. Towards the end of Henry III.'s reign, the three courts received each a distinct staff, and on the abolition by Edward I. of the office of chief justiciar, the only remaining bond of union being severed, they became completely separated (*h*). Some trace of their ancient unity of organisation always survived, however, in the court of Exchequer Chamber (*i*); until at length after six centuries

(*g*) [The somewhat confusing employment of the term *Curia Regis* down to the time when it became exclusively appropriated to the Court of King's Bench, is referred to by Hallam (Mid. Ages, ii. 423), and should be borne in mind. It was used to denote: (1) the *Commune Concilium*, or National Council of the Realm, the Witenagemot in a feudalised form: (2) the *Ordinarium Concilium*, the continual or select council for judicial as well as administrative purposes: 3) The *Court of King's Bench*, springing from the limited tribunal, separated from this last by Henry II. in 1178, and soon after acquired exclusively the denomination *Curia Regis*. *Cf.* Pike, Constit. Hist. of the House of Lords, p. 35.—Ed.]

(*h*) From an early period after their complete severance, the King's Bench, Common Pleas, and Exchequer resorted to various contrivances to enlarge the jurisdiction of their respective courts. The King's Bench always had cognisance of all personal actions where the defendant was already under the custody of that court. By a legal fiction persons not actually in custody of the marshal of the court were assumed so to be, in order to bring them within its jurisdiction; and by a similar legal fiction the Court of Exchequer, though by its constitution precluded from hearing common pleas, gained cognisance of them by allowing the plaintiff to allege that he was a debtor to the Crown, and then to invoke the aid of the court to recover from the defendant what would enable him to pay his debt to the Crown. So long as the judges received profit from fees, they had a direct interest in drawing business each to his own court; and the legal maxim *boni judicis est ampliare jurisdictionem* seemed capable of a somewhat mercenary interpretation. The statutes 2 Will. IV. c. 39, and 2 Vict. c. 110, at length put an end to these fictions, and established one form of process - the writ of summons - for all the courts.

(*i*) The Court of Exchequer Chamber existed down to the passing of the Judicature Act, 1873, under two forms:

(1) As a *Court of mere debate*, into which causes of great weight and difficulty might be adjourned, before judgment was given upon them in the Court below (as was done in *Calvin's case*, 2 St. Tr.

of independent existence they were again united by the Judicature Act (36 & 37 Vict. cap. 66).

Together with the Court of Chancery and the Probate, Divorce, and Admiralty courts, they now form divisions of a consolidated High Court of Justice, itself a branch of the Supreme Court of Judicature (*k*).

559). The Court was then composed of all the judges of the three superior Courts, and sometimes the Lord Chancellor also.

(2) As a *Court of Error* :

(*a*) First created by statute 31 Edw. III. c. 12, to determine errors from the common law side of the Court of Exchequer. Composed of the Lord Chancellor, and Lord Treasurer, and the Justices of the King's Bench and Common Pleas.

(*b*) A second Court of Exchequer Chamber was erected by statute 27 Eliz. c. 8, to determine writs of error from the King's Bench. Composed of the Justices of the Common Pleas and the Barons of the Exchequer.

Both (*a*) and (*b*) were abolished, and

(*c*) The court was reconstituted by 11 Geo. IV. & 1 Will. c. 70, s. 8. Judgments of each of the superior Courts of Common Law (upon proceedings in error in law being instituted) were subject to revision by the judges of the other two courts sitting collectively as a Court of Error in the Exchequer Chamber.

(See Stephen, Commentaries, iii. 428.) By the Supreme Court of Judicature Act, 1873, the jurisdiction of the Court of Exchequer Chamber was merged in that of the new Court of Appeal.

(*k*) [The three courts, viz., the King's Bench Division, the Common Pleas Division and the Exchequer, were by Order in Council of the 16th of December, 1880, amalgamated into the King's Bench Division of the High Court of Justice. The President is the Lord Chief Justice of England, and the powers of the former Chief Justice of the Common Pleas and of the Chief Baron of the Exchequer (these two offices being abolished by the Order) are vested in him. The High Court of Justice now comprises three divisions :

(1) The King's Bench Division (with which is incorporated the former Court of Bankruptcy) consisting of the Lord Chief Justice of England as president, and seventeen other judges;

(2) The Chancery Division consisting of the Lord Chancellor as president and six other judges;

(3) The Probate, Divorce, and Admiralty Division consisting of the president and one other judge.

County Courts.

When establishing the *Curia Regis*, William I. did not abolish the local, *i.e.*, the county courts (*cf. supra*, pp. 68 and 76), over which the sheriffs presided, though he deprived them of all jurisdiction over the affairs of the clergy. These courts, which trace their origin to Alfred the Great or Egbert, formed, according to Hallam, "the great constitutional judicature in all questions of civil rights" (see Hallam, Middle Ages, cap. viii.; Dugdale, Origin of Jud., under title "Courts of Justice"). Their contentious jurisdiction, which had fallen into disuse, was revived in 1846, when the modern county courts were established by 9 & 10 Vict. c. 95, which expressly preserved the non-contentious jurisdiction of the old county courts, as also does

The system of itinerant justices, or justices in eyre (*in itinere*), was not invented by Henry II., but its establishment as an organised and permanent institution is due to him. As early as the reign of Henry I., some of the justices of the Curia Regis were occasionally appointed by the king to go from county to county to collect the revenue and hold pleas, civil and criminal (*l*). Their chief duty, originally, was to collect the revenue, determine disputes as to the amounts payable, and detect and punish frauds on the part of the sheriffs and other fiscal officers (*m*). But they also supplied the place both of the old English royal progresses during which the kings had been wont to hear and determine complaints of failure of justice in the lower tribunals, and of the annual courts which the Conqueror and his two sons held *de more* at Gloucester, Winchester, and Westminster, on the three great festivals of the year. During the anarchy of Stephen's reign the provincial visitations had ceased: but Henry II. restored the practice. The instructions contained in the Assize of Clarendon in 1166 are evidently intended for the guidance of a body of itinerant justices who were about to visit each county, and in conjunction with the sheriffs, try all offenders accused by the jury of presentment (*n*). In 1176, at the Great Council of Northampton, Henry divided the kingdom for fiscal and judicial purposes into six circuits, to each of which three itinerant judges were assigned (*o*). By the Magna Carta of John (*c.* 18) two justices were to be sent into each county four times a year, to take assizes of mort d'ancestor, novel disseisin, and darrein present-

Itinerant justices established by Henry II.

Regular circuits formed, 1176.

the County Courts Act, 1888 (51 & 52 Vict. c. 43), which repeals and consolidates the previous County Courts Acts, and gives to these tribunals an equitable jurisdiction. The jurisdiction of the county courts, both as to trial by jury and the claims in respect of which judgment is sought, was still further extended by the County Courts Act, 1903, 3 Edw. VII. cap. 42. See E. W. Ridges, Constitutional Law of England (1915), pp. 271-274. —Ed.]

(*l*) Hardy, Introduction to Close Rolls, p. xxiv. n.

(*m*) The itinerant justices long continued to be employed as the king's agents for squeezing money out of the people. In a Great Council convened by Henry III. in 1242, the baronage made a complaint against this. Matt. Paris, 582.

(*n*) Select Chart., 134.

(*o*) Ben. Abb., i. 107; Dial. de Scacc., ii. c. 2.

ment; but in the second re-issue of the Charter by Henry III., in 1217, this was altered (c. 13) to one annual visitation. Shortly afterwards the justices appear, for general purposes, to have made their circuit round the kingdom once in seven years only: a practice which was continued till the reign of Edward I.

Judges of Assize and Nisi Prius.

By the statute of Westminster II. (13 Edw. I. c. 30), judges of assize and nisi prius were ordered to be assigned out of the king's sworn justices, associating to themselves two discreet knights of each county, to try matters of fact at the courts of assize and nisi prius. These justices of assize superseded the old justices in eyre, and have continued to the present day (*p*).

From their first institution the itinerant justices were accustomed on circuit to sit in the full county court, which was summoned to meet them. Their provincial visitations thus form "the link between the Curia Regis and the shire-moot, between royal and popular justice, between the old system and the new" (*q*). This direct connection between the court of the king and the court of the shire had most important constitutional effects, hereafter to be noticed, on the growth of the national representative assembly: and to the same cause is mainly due both the uniformity of our common law, and the repression within due limits of the local feudal jurisdictions (*r*).

(*p*) Provincial justice has always been administered under a variety of distinct authorisations, corresponding to the several commissions of the judges. Blackstone (iii. 60) describes the judges of assize as sitting under five commissions: (1) of the peace; (2) of oyer and terminer; (3) of gaol delivery; (4) of assize; (5) of nisi prius. The recent abolition of actions of assize and other real actions has, however, thrown the commission of assize, as distinguished from that of nisi prius, out of force, so that there are now only three commissions (viz., 2, 3, and 4 of above).

(*q*) Stubbs, Const. Hist., i. 648.

(*r*) The shire-moot summoned to meet the itinerant judges was a much more complete representation of the county than the ordinary county court, which at some periods between the reigns of Henry I. and Henry III. began to be held once a month, like the court of the hundred, instead of only twice a year as formerly. "The great franchises, liberties, and manors which by their tenure were exempted from shire-moot and hundred were, before these visitors, on equal terms with the freeholders of the geldable, as the portion of the county was called which had not fallen into the franchises. Not even the tenants of a great escheat in the royal hands escaped the obligation to attend their visitation. . . . A writ of Henry III., issued in 1231, directs the summons to the county court to be addressed to 'archbishops, bishops,

Trial by Jury.

To Henry II. (*s*) must also be ascribed, in addition to his other legal reforms, the wide expansion and regular establishment of the system of recognition by sworn inquest, that is, the finding of facts by the oath of a body of impartial witnesses, who represent the testimony of the local community, and are summoned and examined by an official acting under the king's writ. From this institution our modern trial by jury is lineally descended.

Its origin.

The origin of this "most democratical of juridical institutions," the cherished bulwark of constitutional liberty, has been the subject of much learned discussion, and of numerous conflicting theories. Many eminent writers, including the learned author of the "History of Trial by Jury" (*t*), have stoutly maintained that the English jury is of indigenous growth, and was not derived, directly or indirectly, from any of the tribunals that existed on the continent (*u*). Some have contended for its ancient British or Romano-British origin (*uu*). By others the Anglo-Saxon compurgators (or sworn witnesses to credibility), the sworn witnesses to facts, the *frithborh*, the twelve senior thegns of Ethelred's law who were sworn to accuse none falsely, the system of trial in local courts by the whole body of the shire or hundred, have all been regarded as containing, severally or in combination, the germ of the modern jury. Yet, with the exception of what may be termed Ethelred's jury of presentment (which will

abbots, priors, earls, barons, knights, and freeholders; four men of each township, and twelve burghers of each borough, to meet the justices.'" — Stubbs, Const. Hist., i. p. 651 [and *n.* 2, *ib.*].

(*s*) "The acts of the counsellor are frequently ascribed to the sovereign: but the encomiast and the detractor both agree in ascribing the 'assizes' enacted by Henry to the bent of his own mind."—Palgrave, Eng. Com., i. 243.

(*t*) See Forsyth, Hist. of Trial by Jury; Bourguignon, Mémoire sur le Jury (who despairingly says, "son origine se perd dans la nuit des temps"); Palgrave, English Commonwealth, i. ch. 8; Turner, Hist. Anglo-Saxons; Reeves, Hist. Eng. Law (ed. Finlason.); Meyer, Orig. et Progrès des Inst. Judic., ii. c. 11; Gneist, Self-Government, i. 74 *seq.*; K. Maurer, in the Kritische Ueberschau, v. 180, 322 *seq.*; Brunner, Entstehung der Schwurgerichte; Stubbs, Const. Hist., i. 426, and 657 *seq.* [See also Taylor, English Const., pp. 322 *seq.*; Essays in Anglo-Saxon Law, pp. 186, 187; Brunner, Zeugen und Inquisitionsbeweis, p. 41.—Ed.]

(*u*) Forsyth, Trial by Jury, p. 13.

(*uu*) Philipps on Juries; Probert, Ancient Laws of Cambrai; Reeves, Hist. of English Law.

be considered in connection with the grand jury of later times), not one of these supposed *origins* will be found, on careful examination, to possess much more than a superficial analogy to the inquest by sworn recognitors, the historic progenitor of the existing jury. The theory which presents the fewest *a priori* difficulties, and which is supported by arguments and evidence only falling short of actual demonstration, regards the English system of sworn inquests as an importation from Normandy. There, both before and after the cession of the Neustrian province to Rollo, by Charles the Simple, it had existed, as in the rest of France, from its establishment under the Carolingian kings, whose capitularies contain minute instructions for inquisitions by sworn witnesses in the local courts (*x*). But whatever may be the remote source of this institution, out of which trial by jury grew—a question after all chiefly of antiquarian interest—whether we regard the institution as a modification of the old English judicial system, or, with far greater reason, as an inheritance derived through the Normans from the Carolingian kings, two points are in any case clear: (1) The system of inquest by sworn recognitors, even in its rudest and simplest form, appears for the first time in England subsequently to and shortly after the Norman conquest. (2) This system was in England, from the first, worked in close combination with the previously existing procedure of the shire-moot (*y*):

(*x*) See Palgrave, English Commonwealth, i. ch. 8: Brunner, Entstehung der Schwurgerichte, who traces the inquest by jury, both Norman and English, from the Carolingian Inquisitiones; and Stubbs, Const. Hist., i. 656, who, adopting in the main the theory of Palgrave corrected and adjusted by the recent work of Brunner, says: "The truth seems to be that the inquest by sworn recognitors is directly derived from the Frank Capitularies, into which it may have been adopted from the fiscal regulations of the Theodosian Code, and thus own some distant relationship with the Roman jurisprudence. . . . The continuance of the system in France from the Carolingian times and through the Norman period is proved by Dr. Brunner in his work (Entstehung der Schwurgerichte). The most curious phenomenon in connexion with it is the fact that it was only on English soil that it gained much development, the Norman lawyers seeing themselves rapidly outstripped by those of England, and the institution withering away in the rest of France until it became extinct."

(*y*) See the celebrated trials in the reign of William the Conqueror between Lanfranc, Archbishop of Canterbury, and Odo, Bishop of Bayeux, on Pennenden Heath (Ang. Sacra, i. 334-336); and between Gundulf, Bishop of Rochester, and Picot, Sheriff of Cambridgeshire (*Ib.* i. 339).

and in its developed form of trial by jury is distinctly and exclusively an English institution (*z*).

The twelve thegns in the hundred-moot, a jury of presentment of criminals.

As regards criminal trials, we do indeed meet in the ordinance of King Ethelred II. (*flor.* 978—1016) with a species of jury of accusation clearly analogous to our grand jury, and possibly its direct progenitor. In the gemot of every hundred or wapentake the twelve senior thegns, with the reeve, were directed to go apart and accuse, or, as we should say, present, on oath, all whom they should believe to have committed any crime (*a*). The twelve thegns seem to have performed the part of public prosecutors; but the fact of the guilt or innocence of the accused person had still to be determined by compurgation, or the ordeal. This primitive grand jury probably continued in use, after the conquest, until its reconstitution by Henry II. (*b*), and thus the criminal jury, although, doubtless, largely influenced in its later development by the co-existence of the inquest by jury in civil matters, possesses strong claims to a purely indigenous origin.

Growth of the jury in civil cases.

For more than a hundred years after the conquest the ancient Anglo-Saxon modes of trial, or forms of proof, by ordeal (*judicium Dei*), by oath (compurgation, termed later on "wager of law"), by witnesses, and by production of charters, continued in general use, side by side with the Norman procedure, the wager of battle—an innovation

(*z*) [See Maitland, Const. Hist., pp. 115-131; Pollock and Maitland, Hist. of Engl. Law; Liebermann, Gesetze der Angelsachsen.—Ed.]

(*a*) "This is the ordinance which King Ethelred and his Witan ordained as 'frithbot' for the whole nation, at Woodstock, in the land of the Mercians, according to the law of the English. . . . III. cap. 3. . . . And that a gemot be held in every wapentake; and the xii. senior thegns go out, and the reeve with them, and swear on the relic which is given them in hand, that they will accuse no innocent man, nor conceal any guilty one." Thorpe. Anc. Laws and Inst.; Select Chart., 71-72.

(*b*) Ang.-Sax. Chron., ann. 1224. ". . . After S. Andrew's mass, before Christmas, Ralph Basset [justiciar] *and the king's thegns* held a 'gewitenemot' at Hundehoge in Leicestershire, and there hanged so many thieves as never were before, that was in that little while, altogether four and forty men." The Pipe Roll of 31 Hen. I. contains numerous references to the *judices* and *juratores* of the shire and hundred courts. Under one or the other of these names the jury of presentment may probably have been indicated. [For a more detailed account of the ordeal, see Liebermann, Gesetze der Angelsachsen, pp. 401-29.—Ed.]

detested by the English (*c*), and at length gladly laid aside by the Normans themselves,—and the occasional use of the inquest by sworn recognitors. It was only gradually, however, that the advantages of the principle of recognition by jury in its application to judicial procedure became impressed upon the minds of both rulers and ruled. At first the sworn inquest seems to have been chiefly applied to matters not judicial, such as the ascertainment of the laws of King Edward (*d*), the domesday survey (*e*), the assessment of feudal taxation under William Rufus and Henry I., and the customs of the church of York, which the latter monarch, in 1106, directed five commissioners to verify by the oath of twelve of the citizens (*f*). There are, however, equally early instances of strictly legal matters being decided by the recognition on oath of a certain number of *probi et legales homines*, selected from the men of the county to represent the neighbourhood and testify to facts of which they had special knowledge. In a suit as to certain lands of the church of Ely, the Conqueror directed his justiciars to assemble the shire-moots of the shires in which the possessions of the abbey of Ely lay, and ascertain the truth by the oath of a number of English to be chosen for their knowledge of the state of the lands in the time of King Edward (*g*). A like proceeding is directed with reference to the rights of the monks of Ramsey in an extant writ of William Rufus directed to the sheriff of Northamptonshire (*h*). One of the most marked of these early instances of the *probi vicini* being summoned as a jury for judicial purposes occurs in the reign of Henry I. A writ was addressed in the name of William the Atheling to the sheriff of Kent,

(*c*) "The trial by battle was in England an innovation; it was one from which the English recoiled as an instrument associated with tyranny, if not devised for the purpose of tyrants; and the charters of the boroughs frequently contain a provision, dearly bought no doubt, but greatly valued, that the burghers shall not be liable to its use."—Stubbs, Const. Hist., i. 659.

(*d*) *Supra*, p. 63.

(*e*) *Supra*, p. 53.

(*f*) Thoroton, Nottinghamshire, iii. 77; Stubbs, Const. Hist., i. 655.

(*g*) Liber Eliensis, 256. [Bigelow, Plac. Ang.-Norm., 24.—Ed.]

(*h*) Palgrave, Eng. Com. (Proofs), clxxix.

requiring him to summon "Hamo the son of Vital, and the *probi vicini* of Sandwich whom Hamo has named, to say the truth" respecting the freedom from toll of a vessel belonging to the abbot of St. Augustine's, which seems to have been seized for non-payment of dues. By a subsequent writ the sheriff was directed to restore the vessel to the abbot, according to the verdict or recognition of the good men of the county (*sicut recognitum fuit per probos homines comitatus*) (*i*). Henry II. applied recognition by jury to every description of business, fiscal and legal, and henceforth down to the reign of Edward I. it was, in particular, the most usual machinery employed for the assessment of taxation (*k*).

Earliest mention of a jury in statute law.

The use of a jury, both for criminal presentment and civil inquest, is mentioned for the first time in our statute law in the Constitutions of Clarendon. The way in which the jury is therein referred to seems to imply that it had already grown into general use and favour. When no one could be found to accuse a powerful layman amenable to the bishop's jurisdiction, the sheriffs, at the bishop's request, were directed to "swear twelve lawful men of the neighbourhood to tell the truth, according to their conscience," and the same statute declared that "by the recognition of twelve lawful men," the chief justice should decide all disputes as to the lay or clerical tenure of land (*l*).

Henry II.'s Grand Assize.

It was in the Grand Assize (*m*) (the exact date of which is unknown) that the principle of recognition by jury, having

(*i*) Hist. Mon. S. August, pp. 353-354; Palgrave, *ubi sup.*; Forsyth, Trial by Jury, 104.

(*k*) The variations in the mode of assessing taxation during this period and the increasing use of the jury for that purpose, are traced by Stubbs, Select Chart., pp. 147, 251, 275, 342, 345, 351, 357. By the Great Charter of John, sec. 20, amercements were only to be imposed "per sacramentum proborum hominum de visneto."

(*l*) *Supra*, p. 87.

(*m*) Assisa = Statute or Ordinance. The recognition by jurors was called an assize because it was established by an assisa or statute of Henry II., the text of which, however, has not been preserved. It seems to have been called "magna" from the importance of the questions to be decided under it and the superior station of the "milites" who were to compose the jury. The "milites" were not always actual knights, but they must have possessed landed property sufficient to render them legally compellable to take

gradually grown into familiar use in various civil matters, was applied by Henry II., in an expanded and technical form, to the decision of suits to try the right to land. It is described by Glanvill as a royal boon conferred on the people, with the counsel and consent of the proceres, to relieve freeholders from the hardship of defending the title of their lands by the doubtful issue of trial by battle (*n*). By the Grand Assize the defendant was allowed his choice between wager of battle and the recognition (*i.e.*, knowledge) of a jury of twelve sworn knights of the vicinage summoned for that purpose by the sheriff.

Other assize.

In actions not seeking to determine the absolute right to land, but dealing with the seisin only (of which the "assize of novel disseisin" was the most important), the sheriff himself chose twelve knights or freeholders (*legales homines*) of the vicinage, who were sworn to try the question. In both cases the recognitors were sworn to found their verdict upon their own knowledge, gained either by eye-witness or by the words of their fathers, or by such words as they are bound to have as much confidence in as if they were their own (*o*). The proceeding by assize was in fact merely the sworn testimony of a certain number of persons summoned to give evidence upon matters within their own knowledge. They were themselves the only witnesses. If all were ignorant of the facts, a fresh jury had to be summoned; if some of them only were ignorant, or if they could not agree, others were to be added—a process subsequently called "afforcing" the jury—until a verdict could be obtained from twelve unanimous witnesses (*p*).

The jury were witnesses.

"Afforcing" the jury.

The remedy by assize was subsequently improved by several Acts of Parliament, particularly 13 Ed. I. c. 25; and as all actions on the assize were tried in the King's Court or in that of the justices itinerant, the jurisdiction

the degree of knighthood or pay a fine. In ancient times the word "miles" was in fact almost synonymous with "gentleman" now.—Forsyth, Trial by Jury, 453. [*Cf.* also Taylor, Engl. Const., p. 329.—Ed.]

(*n*) De Legibus Angliae, lib. ii. c. 7.

(*o*) Glanvill, lib. ii. c. 17.

(*p*) *Ibid.*; Bracton, lib. iv. c. 19. An example of the whole jury being ignorant of the facts, and of the summons of a fresh one in consequence, occurs in Placit. Abbrev. 11.

of the county and hundred courts began, from this period, rapidly to decline.

Growth of the jury in criminal cases.

By the Assize of Clarendon the principle of recognition by jury was extended to criminal cases. It was ordained that in every county twelve lawful men of each hundred, with four lawful men from each township, should be sworn to present all reputed criminals of their district in each county court. The persons so presented were to be at once seized and sent to the water ordeal (*q*). This was simply a reconstitution or revival, in an expanded form, of the old English institution analogous to a grand jury, which, as we have seen, had existed at least since the time of King Ethelred II.

By the Articles of Visitation issued under Richard I. in 1194, as instructions to the itinerant justices, the election and constitution of the jury of presentment established by Henry II. was further regulated, and assimilated to the system already in use for nominating the recognitors of the Grand Assize (*r*). From this developed jury of presentment our present grand jury has historically descended (*s*).

(*q*) Assize of Clarendon, Select Chart., 137. Even those who successfully passed through the ordeal were to abjure the kingdom within eight days, as being of evil character by the testimony of the neighbourhood.

(*r*) Hoveden, iii. 262; Select Chart., 251.

(*s*) In the course of time the element of popular election in the mode of nominating the grand jury was entirely eliminated. Under the present grand jury system twenty-four freeholders of the county are summoned by the sheriff. Of these, a certain number, varying from twelve to twenty-three, are sworn, and having been previously instructed in the articles of enquiry by a "charge" from the judge, withdraw to examine indictments and hear privately the evidence for the prosecution only. If twelve are satisfied of the truth of the accusation, the grand jury find "a true bill," and the prisoner is then put on his trial in open court before a judge and twelve petit jurymen. If not satisfied, the grand jury find "no true bill." This is termed "ignoring" the bill, from the word "ignoramus," which was formerly indorsed on it. A famous historic case of "ignoramus" occurred on the trial of Lord Shaftesbury for high treason in 1681, when the grand jury of London ignored the bill.—State Tr., viii. 768. A more recent case, arising out of the Jamaica rebellion, was the ignoring the indictment for murder against Governor Eyre. [Any person may present a bill to a grand jury accusing any other person of any crime whatever. This is the general rule to which, as yet, hardly any exception has been made. Thus any one may prefer a bill against any one of the king's ministers.—Maitland, Const. Hist., p. 475.—Ed.]

Compurgation dies out.

The establishment of this system of combined presentment and ordeal had the effect of abolishing, in all criminal cases, the ancient practice of compurgation by the oath of friends, "the manifest fountain of unblushing perjury" (*t*).

Ordeal abolished.

In the year 1215, the ordeal was abolished throughout Christendom by the fourth Lateran Council, and there remained only, for criminal trials in England, the grand jury and the combat. But the combat was not applicable unless an injured prosecutor, or "appellant," came forward to demand it; and as the grand jury was found inadequate to secure perfect justice, the practice (which had been introduced even before the abolition of ordeal) gradually grew up of allowing a second, or petit jury to affirm or traverse the testimony of the first set of inquest-men. This became the general usage in the reign of Henry III. Still for a long time no prisoner was compellable to plead, that is, he might refuse to be tried by the jury; but in this case he was remanded to prison, and from the date of the Statute of Westminster I. (3 Edward I.) was liable to the barbarous punishment called *peine forte et dure*, which was only abolished so late as the reign of George III. (*u*).

The combat.

Petit jury introduced.

Peine forte et dure.

Difference between the ancient and modern jury.

It is important to bear in mind that in trial by jury as permanently established, both in civil and criminal cases, by Henry II., the function of the jury long continued very different from that of the modern tribunal. The jurymen were still mere recognitors, deciding simply on their own knowledge or from tradition, and not upon

(*t*) In boroughs (whose charters exempted them from the jurisdiction of the county court), compurgation was retained some time longer. In the civil action of debt, it lingered on to a recent period. The defendant, in an action of debt, was allowed "to wage his law," that is, to deny upon oath the debt, and vouch eleven compurgators in support of his credibility. The consequence of this was that plaintiffs avoided, when they could, that form of action, for, as Coke says of his own time, "Men's consciences do grow so large (specially in this case passing with impunity) as they choose rather to bring an action upon the case upon his (the defendant's) promise, wherein (because it is *trespass sur le case*) he cannot wage his law, than an action of debt."—Co. Lit., 295, b. The defendant himself was sworn *de fidelitate*, and the eleven compurgators *de credulitate* (Forsyth, 82). Wager of law was abolished in 1833, by 3 & 4 Will. IV. c. 42, s. 13.

(*u*) 12 Geo. III. c. 20. For an account of the *peine forte et dure*, see Palgrave, Eng. Comm. (Proofs and Illustrations), clxxvi., clxxvii., clxxxix. Stephen, Comm. iv. 476.

evidence produced before them; and it was for this reason that they were always selected from the hundred or vicinage in which the question arose (*w*).

Later development of the jury.

The later development, common to the civil and criminal jury alike, by which the jurors gradually changed from witnesses into judges of fact, the proof of which rested exclusively on the evidence of others, has now to be considered. The number of the recognitors was at first undefined, but when Glanvill wrote, under Henry II., twelve appears to have been the usual, though not the invariable, number mentioned in the king's writs. We have seen that it was necessary that twelve jurymen should concur in their verdict, and this result, in civil cases at least, was procured by "afforcing" the jury, that is, adding other recognitors from the vicinage who were acquainted with the matter. But the difficulty of procuring a verdict of twelve caused for a time the verdict of a majority to be received. In the reign of Edward III., however, the necessity for a unanimous verdict of twelve was re-established (*x*).

(*w*) "Trial by jury, according to the old English law, was a proceeding essentially different from the modern tribunal, still bearing the same name, by which it has been replaced; and whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty. Jurymen in the present day are triers of the issue: they are individuals who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not impanelled to examine into the credibility of the evidence: the question was not discussed and argued before them: they, the jurymen, were the witnesses themselves, and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form a trial by jury was therefore only a trial by witnesses; and jurymen were distinguished from any other witnesses only by customs which imposed upon them the obligation of an oath and regulated their number, and which prescribed their rank and defined the territorial qualifications from whence they obtained their degree and influence in society."—Palgrave, Eng. Com., i. 243. [*Cf.* Gneist, Hist. Engl. Const., p. 292.—Ed.]

(*x*) [By the County Courts Act, 1903 (3 Edw. VII. c. 42), the number of county court jurymen was increased from five to eight. See supra, p. 140.—Ed.]

Under Henry III. special witnesses (such as the witnesses to a deed) were sometimes summoned together with, and formed part of, the jury.

In the year books of 23 Edward III. mention is made of witnesses being adjourned to the jury to give them their testimony, but without having any voice in the verdict. This is the first indication of the jury deciding on evidence formally produced in addition to their own knowledge, and forms the connecting link between the ancient and the modern jury (*y*).

Early in the reign of Henry IV. a further advance was made. All evidence was required to be given at the bar of the court, so that the judges might be enabled to exclude improper testimony (*z*).

From this change flowed two important consequences: (1) From the exercise of control on the part of the judges sprang up the whole system of rules as to evidence. (2) The practice of receiving evidence openly at the bar of the court produced a great extension of the duty of an advocate. Henceforward "witnesses were examined and cross-examined in open court: the flood-gates of forensic eloquence were opened, and full scope given to the advocate to exercise his ingenuity and powers of persuasion on the jurors, to whose discretion the power of judging on matters of fact were now entrusted" (*a*).

In the treatise of Chief Justice Fortescue, "De Laudibus Legum Angliae," written soon after the year 1450, we have clear evidence that the mode of procedure before juries by vivâ voce evidence was the same as at present (*b*).

But juries were still for a long time entitled to rely on their own knowledge in addition to the evidence. In the first year of Queen Anne, the Court of Queen's Bench decided that if a jury gave a verdict of their own know-

(*y*) Spence, Eq. Juris., i. 129.

(*z*) In a reported case of 11 Hen. IV., a verdict was set aside because the jury, on retiring to consider their verdict, had taken with them an escrow which had *not been proved in evidence at the bar by the party, nor delivered to them by the Court*. Starkie, Trial by Jury (Law Review, No. iv., Aug., 1845, p. 397).

(*a*) Starkie, Trial by Jury (Law Review, No. iv., Aug., 1845).

(*b*) Fortescue, De Laud. Leg. Ang., c. 26; Hallam, Midd. Ages, ii. [400].

ledge, they ought so to inform the court, that they might be sworn as witnesses. This, and a subsequent case in the reign of George I., at length put an end to all remains of the ancient functions of juries as recognitors (*c*).

Rule as to venue.

In the same way the ancient rule requiring jurors to be returned from the vicinage or hundred, which arose when jurymen were themselves the witnesses, was, after various modifications, abolished in all civil actions in the reign of George II. (*d*), and it was directed that juries should be summoned from the body of the county.

Writ of attaint.

While the jurymen were mere recognitors, or witnesses, if they gave a wrong verdict, they must usually have been guilty of perjury. Hence, at common law, they became liable to the writ of attaint, which, in the time of Henry II., was restricted to pleas of assize only (novel disseisin, &c.), but was afterwards, by various statutes, extended to "every plea, real as well as personal" (*e*).

In attaint the cause was tried again by a jury of twenty-four. If the verdict of the second jury was opposed to that of the first, the original twelve jurors were arrested and imprisoned, their lands and chattels were forfeited to the king, and they became for the future infamous. At a later period other severities were added to the sentence (*f*).

After the jury became distinct from the witnesses, attaint gradually fell into disuse. Sir Thomas Smith, in 1583, says attaints were "very seldom put into use" (*g*). In 1757, Lord Mansfield said "the writ of attaint is now a mere sound in every case" (*h*); but it was not legally abolished till the reign of George IV. (*i*).

Long before the legislative abolition of attaint, the important object which that proceeding indirectly attained —a review of the first verdict— had been otherwise secured.

(*c*) Spence, Eq. Juris., i. 130.
(*d*) 4 & 5 Anne, c. 16, and 24 Geo. II. c. 18.
(*e*) 34 Edw. III. c. 7. An attaint lay in civil cases only. *Bushell's Case*, [1670] 6 State Trials, 999; Hawkins, Pleas Cr., bk. i. ch. 72, s. 5.
(*f*) Broom, Constitutional Law, 154 [2nd ed. by G. Denman, 1885].
(*g*) Smith, Commonwealth (ed. 1635), iii. ch. 2, p. 207.
(*h*) *Bright* v. *Eynon*, [1757] 1 Burr. 393.
(*i*) 6 Geo. IV. c. 50, s. 60.

in practice, by the motion for a new trial and rule thereupon granted, the first recorded instance of which occurred in the year 1665 (*k*).

Juries fined and imprisoned.

Besides the legal method of attaint, there was also another and illegal method of punishing a jury for a false verdict, frequently employed by the Tudor and Stuart sovereigns for political purposes. This was by fine and imprisonment by the court of the Star Chamber. In the first year of Queen Mary's reign, in 1554, Sir Nicholas Throckmorton was tried and acquitted by a jury on a charge of high treason in connection with Sir Thomas Wyatt's rebellion. Thereupon "the court, being dissatisfied with the verdict, committed the jury to prison." Some of the jury apologised and were liberated, the rest were fined by the court of Star Chamber and kept in prison till the fines were paid (*l*).

Immunity of juries established.

After the abolition of the Star Chamber, the crown made use of the judges to intimidate juries. At length the immunity of juries was finally established in 1670, by the celebrated decision of Chief Justice Vaughan in *Bushell's case* (*m*). Edmund Bushell was foreman of the jury who acquitted the famous William Penn and William Mead, the Quakers, on a prosecution for having preached to a large assemblage of people in Gracechurch Street, contrary to the Conventicle Act (16 Car. II. c. 4). The recorder of London fined each of the jury 40 marks (£26 13s. 4d.); and Bushell, having been committed to prison for refusing to pay, sued out his writ of *habeas corpus* in the Court of Common Pleas. On the return being made that he had been committed for finding a verdict "against full and manifest evidence and against the direction of the court," Chief Justice Vaughan held the ground to be insufficient, and discharged the prisoner.

General verdicts.

In his judgment in this case, Chief Justice Vaughan was led to affirm the legal right of the jury, without the direction of the judge, to find a general verdict in criminal

(*k*) Forsyth, Hist. of Trial by Jury, 186.
(*l*) 1 State Trials, 869.
(*m*) Vaughan, 135; 6 State Trials, 999; Broom, Const. Law, 117-138. *Cf. Floyd* v. *Barker*, [1607] 12 Rep. 23; *Earl of Macclesfield* v. *Starkey*, [1684] 10 St. Tr. 1330.

cases, that is, to determine not only the truth of the facts, but their quality of guilt or innocence (*n*). This question came up again with reference to the law of libel. In the trial of the Seven Bishops, in 1688, the jury asserted their right to decide upon the purport of the libel, but subsequently in the trial of the printers of the "North Briton" in 1764, Lord Mansfield ruled that it was the province of the court alone to judge of the criminality of a libel, a doctrine wholly subversive of the rights of juries. This doctrine, after being both assailed and maintained for a long time, was at length reversed, in opposition to all the judges and chief legal authorities of the time, by the passing, in 1792, of Fox's Libel Act (32 Geo. III. c 60), which, in the form of a declaratory law, enacted that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue (*o*).

The King's Continual Council.

After the old Curia Regis had been permanently split up into the three separate courts of King's Bench, Common Pleas, and Exchequer, each under its own chief, the ancient personal jurisdiction of the king still continued to be exercised by him in his "Continual" or Ordinary Council (the source of the later Privy Council) (*p*), not only as an upper court of appeal, but as a direct court of royal justice in all cases which had not been specially delegated to the recently constituted courts of common law. It was, however, during the minority of Henry III. that the king's Continual or Permanent Council, as distinct alike from the Curia Regis of Henry II.'s time and from the Commune Concilium Regni, acquired special prominence

(*n*) 6 State Trials, 1013.

(*o*) See May, Const. Hist., ii. 253-263.

(*p*) The term "Privy Council" does not appear to have been used until after the reign of Hen. VI.; *secretum concilium* occurs in Hemingburgh (ii. 20); and Walsingham (ii. 48), speaking of the abrogation of Acts of Parliament by Richard II. and his Council, says, *Rex cum privato concilio*; but the usual style was "continual" or "ordinary" council. A distinction was probably always made according to the nature of the business; subjects of purely political deliberation seemed to have been discussed by the great officers of state, or as we should now say the ministers, alone, without the presence of the judges or other legal members of the *concilium ordinarium*. They formed therefore an internal council of government, in some respects analogous to the modern Cabinet.

and strength. It comprised not only the officers of state and of the royal household, with the whole body of the judges, but a varying number of bishops and barons, as well as other members, both clerical and lay, whose sole official status appears to have been that of counsellors (*q*). Maintained by Henry III. throughout his long reign, and adopted and further developed by Edward I., the Royal Council became henceforth the special representative and instrument of the kingly power acting side by side with, often in opposition to, the power of the National Council. The Royal Council, as its designation "continual" denotes, was always sitting for the despatch of business (*r*), and for that purpose it occupied different chambers about the palace, among which the Star Chamber, *la Chambre des Etoiles* (*s*), is specially mentioned in the records of Edward III.'s reign (*t*). Its powers were most extensive, and indeed indefinite. It was the king's standing council of advice in all matters of administration; it received, discussed, and remitted to the proper courts a vast number of petitions, which were constantly being presented, praying for relief in various matters of judicial cognisance (*u*); it exercised by itself, in conjunction with the lords' house in parliament, a very great jurisdiction in causes both civil and criminal; and in matters of a temporary, partial, or comparatively unimportant nature, it assumed, by issuing ordinances claiming the force of statutes, the exercise of legislative powers.

Its extensive jurisdiction.

As regards the particular description of judicial business, civil and criminal, disposed of by the Council itself, we have seen that Henry II., in 1178, had constituted it a court of appeal for all such causes as the ordinary judges

(*q*) See Stubbs, Const. Hist., ii. 41, 269 *seq.*

(*r*) Sir N. H. Nicolas, Preface to Proceedings of Privy Council, p. iii.

(*s*) [Or *Chambre d'estoiles*, a translation of the mediæval Latin term *camera stellata* (used in the fourteenth century).]

(*t*) 31 Edw. III. st. 1, c. 12; Spence, Eq. Juris., i. 330. [See *infra*, pp. 166 *seq.*—Ed.]

(*u*) The general nature of these petitions appears from the answers of the Council which have been preserved: "Sue at Common Law" (*i.e.*, by ordinary writ); "sue in Chancery" (*i.e.*, before the ordinary common law court held before the Chancellor); "to be heard before the Great Council"; "a writ on the subject shall be despatched out of Chancery"; "a remedy shall be provided," &c.—Hardy, Introd. to Close Rolls, p. xxvi.

should be incapable of determining (*w*). The Council also exercised a convenient and salutary jurisdiction in cases of injury and oppression where, from the heinousness of the offence, the rank or power of the defendant, popular riots, or other causes, it was likely that a fair trial in the inferior courts could not be obtained, or that the process of the courts would be resisted by force. The rapine and oppression committed by the powerful nobility during the Middle Ages, more especially under the weak administration of the Lancastrian kings, frequently called for the interposition of this paramount authority (*x*). Further, where a person was suffering imprisonment by the process of an inferior court, the double remedy of a *subpœna* against the pursuing party and a writ of *habeas corpus cum causa* (by which the cause itself and the body of the defendant were brought to be dealt with by the Council) was sometimes given (*y*). The Council had also the power of issuing writs into all special jurisdictions or franchises, such as Wales and Ireland (*z*); and the poor, in theory at least, were the objects of its special care (*a*).

Rise of the Chancellor's jurisdiction.

In the exercise of its judicial functions, the Concilium Ordinarium appears to have been generally presided over by the Chancellor, who, until the reign of Edward III., was always an ecclesiastic of high dignity, and as keeper of

(*w*) *Supra*, pp. 138, 139.

(*x*) In "Provisions for the good governance of this land, that the Lordes, which ben of the K. Counsaill desireth," of the second year of Henry VI., subsequently embodied, with additions, in the Articles for the Regulation of the Council agreed to in Parliament, the eighth year of his reign, we read: "Item, that alle the billes that comprehend materes terminable atte the commune Lawe . . . be remitted there to be determined; but if so be that the discrecion of the Counsaill feele *to greet myght on that oo syde and unmyght oo that othir*, [or elles other cause reasonable yai shall move hem.]"—Rot. Parl., iv. 201 [343].

(*y*) Palgrave, Essay on the Jurisdiction of the King's Council, 90, 134.

(*z*) *Ibid.*, p. 19.

(*a*) Rot. Parl., iv. 201. 2 Hen. VI., 1423. "Item that the Clerc of the Counsail be sworn, that every day that the Counseill sitteth on ony Billes bitwyx partie and partie, that he shall, as fer as he can, aspye which is *the porest Suyturs Bille, and that first to be redd and answered*, and *the King's Sergeant* to be sworne trewly and plainly, *to yeve the poor Man* that for suche is accept to the Counsail, *assistense and trew Counsaill* in his matere so to be suyd, *wythout eny good takyng of him*, on peyne of discharge of ther Offic'."

the king's conscience was peculiarly entrusted with the duty of redressing the grievances of the king's subjects. This great officer, independently of his connection with the Council, exercised an ordinary legal jurisdiction of much importance (*b*). But in the reign of Edward I. we begin to perceive signs of the rise of the extraordinary or equitable jurisdiction of the chancellor. The numerous petitions addressed to the king and his Council, seeking the interposition of the royal grace and favour either to mitigate the harshness of the common law or supply its deficiencies, had been in the special care of the chancellor, who examined and reported upon them to the king. The inconvenience arising from the "multitude" of petitions in the year 1280 caused a special order to be issued by Edward I., directing that all petitions be examined, and according as they concerned the seal, the exchequer, the law of the land, or jewry, they should go primarily to the chancellor, the exchequer, the justices, or the justices of the jewry. But if the wants of the petitioners were of a nature so great, or so much of grace, that the chancellor and the justices could not act without the king, then they should be brought before the king to learn his will; but so that no petition come before the king and his Council except by the hands of the chancellor and the other chief ministers (*c*). This monarch was wont to assign by writ under the privy seal certain of the petitions addressed to him, praying extraordinary remedies, to the chancellor and master of the rolls, or to either separately, with directions to give such remedy as should appear to be consonant with honesty (or equity, *honestati*) (*d*). During the reign of Edward II. the jurisdiction of the court of chancery was considerably extended, and there occurs frequent and familiar mention of the *consuetudo cancellariæ* (*e*). At length, in 1348, by a writ

(*b*) On the chancellor's ordinary jurisdiction, see Spence, Eq. Juris., i. 336. The proceedings were by common law process; but as the chancellor had no authority to summon a jury, issues of fact were remitted for trial to the Court of King's Bench.

(*c*) Rot. Claus. 8 Edw. I., in Ryley's Placita Parl., 442.

(*d*) Spence, Eq. Juris., i. 355. "Quale de *jure* et *gratia cancellariae*" occurs in a writ of 12 Edw. I.

(*e*) Lord Campbell, Lives of the Chancellors, i. 204.

or ordinance of the twenty-second year of Edward III., all such matters as were "of grace" were directed to be despatched by the chancellor or by the keeper of the privy seal (*f*). This was a great step in the recognition of the equitable jurisdiction of the court of chancery as distinct from the legal jurisdiction of the chancellor and of the courts of common law (*g*), although it was not until the following reign that it can be said to have been permanently established.

Encroachments of the Council on the jurisdiction of the common law.

But the Council of the chancellor, not content with their admitted sphere of action, unconstitutionally assumed original jurisdiction in cases cognisable at common law. In direct violation of the liberties guaranteed by the Great Charter, men were arbitrarily imprisoned without the legal process of indictment or presentment, and their lands seized into the king's hands.

Restraining statutes.

During the reign of Edward III. a series of statutes were passed, in answer to the repeated complaints of the commons, restraining these illegal invasions by the Council upon the rights of property and personal liberty. In the 5th Edward III. (1331), it was enacted that "no man from henceforth shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, or chattels, seized into the king's hands, against the form of the Great Charter and the law of the land" (*h*). Twenty years later, the commons again petitioned against the illegal proceedings of the Council. Receiving a somewhat unsatisfactory reply from the king, they repeated their

(*f*) Sir T. Duffus Hardy, Introduction to Close Rolls, xxviii.

(*g*) "By 'equitable jurisdiction' must be understood," says Lord Campbell (*op. cit.*, i. 8, 9), "the extraordinary interference of the Chancellor, without common-law process or regard to the common-law rules of proceeding, upon the petition of a party grieved who was without adequate remedy in a court of common law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories; and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum æquum et bonum*, which was enforced by imprisonment. Such a jurisdiction had belonged to the *Aula Regia*, and was long exercised by Parliament; and when Parliament was not sitting, by the king's Ordinary Council. . . . To avoid the circuity of applying to Parliament or the Council, the petition was very soon, in many instances, addressed originally to the Chancellor himself."

(*h*) 5 Edw. III. c. 9.

petition to parliament in the following year (1352), and obtained the enactment of a statute which, expounding the words of Magna Carta, explicitly declares: "Whereas it is contained in the Great Charter of the franchises of England, that none shall be imprisoned nor put out of his freehold, nor of his franchises nor free custom, unless it be by the law of the land; it is accorded, assented, and established, That from henceforth *none shall be taken by petition or suggestion, made to our lord the king or to his Council, unless it be by indictment, or presentment of good and lawful people, of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law*, nor that none be ousted of his franchises nor of his freeholds, unless he be duly brought into answer and forejudged of the same *by the course of the law;* and if anything be done against the same it shall be redressed and holden for naught" (*i*).

Similar provisions were contained in a short enactment of the 28th of Edward III. (*k*); yet in the 36th of the same reign (1362) we find the commons again complaining, and it was "ordained and established by the assent of the prelates, dukes, earls, barons, and the commons, that the charters and statutes be held and put in execution according to the said petition" (*l*). In the following year another statute was passed in these terms: "Though it be contained in the Great Charter that no man be taken nor imprisoned nor put out of his freehold without process of the law; nevertheless divers people make false suggestions to the king himself as well for malice as otherwise, whereat the king is often grieved and divers of the realm put in damage against the form of the said Charter; wherefore it is

(*i*) 25 Edw. III. stat. 5, c. 4 (Stat. of the Realm, i. 321).

(*k*) 28 Edw. III. c. 3.

(*l*) Rot. Parl., ii. 269. The mention here of dukes as a separate rank is noteworthy. The title had been bestowed for the first time in England only twenty-five years previously (in 1337), when the Black Prince was created Duke of Cornwall. Henry, Earl of Lancaster [great-grandson of Henry III.], was, in 1351, the next recipient; [he died March 24, 1360] and his title was revived this very year, 1362, in his son-in-law, John of Gaunt. The only other English duke then in existence, besides the Black Prince and John of Gaunt, was their brother Lionel, created Duke of Clarence [September 15, 1362].

ordained that all they which make such suggestions shall be sent with the same suggestions to the Chancellor, Treasurer, and his Grand Council, and that they there find surety to pursue their suggestions, and incur the same pain that the other should have had, if he were attainted, in case that the suggestion be found evil; *and that then process of law be made against them without being taken or imprisoned against the form of the said Charter and other statutes*" (*m*).

In the 42nd year of Edward III. (1368) the commons again petitioned: "Because many of your Commons are hurt and destroyed by false accusers, who make their accusations more for their revenge and particular gain than for the profit of the king or of his people; and of those that are accused by them some have been taken, and others are made to come before the King's Council by writ, or other commandment of the king, upon grievous pain contrary to the law: That it would please our lord the king, and his good Council, for the just government of his people, to ordain that, if hereafter any accuser propose any matter for the profit of the king, the same matter be sent to his justices of the one bench or of the other, or of the Assizes, to be inquired of and determined according to the law; and if it concern the accuser or party, that he have his suit at the common law; and that no man be put to answer without presentment before the justices, or matter of record, or by due process and original writ, according to the ancient law of the land. And if anything henceforth be done to the

(*m*) 37 Edw. III. c. 18; Stat. of the Realm, i. 384. Hallam (Midd. Ages, iii. 253) appears to have misapprehended the purport of this obscurely worded statute in saying that it "recognises in some measure those irregular proceedings before the Council by providing *only* that those who made suggestions to the Chancellor and Great Council, by which men are put in danger against the form of the Charter, shall give security for proving them." The accusers were to give security to prosecute their suit and to incur, in the event of an acquittal, the same penalty as that to which the accused would have been subjected if found guilty; but the prosecution itself was to be "by process of law made against them [the accused] without being taken or imprisoned against the form of the said Charter." The effect of the statute would seem to be to punish all persons making false suggestions to the king himself, instead of proceeding by due process of law, by compelling them to resort to the regular courts, and in addition to pay a penalty if they failed to prove their case.

contrary, that it be void in law and held for error." The answer to this petition, whereon a statute to the same effect was grounded, runs: "Because this article is an article of the Great Charter, the king willeth that this be done, as the petition doth demand" (*n*).

Little effect of the restraining statutes.

Acts of Parliament, however, were of little avail against the stubborn perseverance of king and Council in retaining the power which they had been so long accustomed to use. The civil jurisdiction of the Council was at this time principally exercised in conjunction with the chancery, now growing into importance, and the two are henceforth generally named together in the remonstrances which the commons still from time to time continued to present. To a petition in the 13th of Richard II. (1389), that neither the chancellor nor the king's council should make any ordinance against the common or statute law, or the ancient customs of the land, "but that the common law have its course for all the whole people, and that no judgment rendered be annulled without due process of law" (*o*), the king returned the unsatisfactory answer: "Let it be done as has been usual heretofore, provided the royal prerogative be saved (issint que la Regalie du Roi soit sauve); and if any one feel aggrieved, let him show it specially and right shall be done him" (*p*).

The writ *subpœna*.

During Richard II.'s reign, especially in the second chancellorship of Archbishop Arundel, the equitable jurisdiction of the chancery was much extended, and the famous writ of *subpœna* came into use as invented or improved by John de Waltham, master of the rolls. This innovation does not appear to have merited the great importance attached to it (*q*), but it was highly unpopular at the time, and excited vigorous complaints from the commons. The lawyers, too, of the ordinary courts, manifested much professional jealousy of the growing jurisdiction of chancery; and as the chancellor was almost always an ecclesiastic, and

(*n*) 42 Edw. III. c. 3, and Rot. Parl., ii. 295.

(*o*) "Et que null Juggement renduz soit adnulle sanz due proces du Ley." Hallam [Mid. Ages, iii. 139] translates this passage with less than his usual accuracy, in a manner which materially alters its sense.

(*p*) Rot. Parl., iii. 266.

(*q*) Lord Campbell, Chancellors, i. 246.

was guided in his decisions by the civil and canon laws rather than by the customary laws of the country, the laity naturally regarded his office with distrust. "In the reign of Edward III. the exactions of the Court of Rome had become odious to the king and the people. . . . A general distaste on the part of the laity of all ranks to everything connected with the Holy See had begun to spring up. The name of the Roman law, which in the reigns of Henry II. and III. and of Edward I. had been in considerable favour at court, and even with the judges, became the object of aversion. In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common law tribunals" (*r*). Nothing more, however, was effected in this reign than the passing of the Act of 1393, by which power was given to the chancellor to award damages in cases where people should be compelled "to come before the King's Council or in the chancery by writs grounded on untrue suggestions" (*s*); a remedy which being referred to the discretion of the chancellor himself, whose jurisdiction was to be controlled, proved wholly ineffectual, but which was used as a parliamentary recognition of the authority of the court, and a pretence for refusing to establish any other check upon it (*t*).

Aversion to Roman law.

From the passing of the statute 17 Richard II. at the latest, the court of chancery may be regarded as a distinct and permanent court, having separate jurisdiction, with its own peculiar mode of procedure, similar to that which had prevailed in the Council (*u*). During the reigns of Henry IV. and Henry V., and in the minority of Henry VI., the commons continued to remonstrate against the encroach-

Permanent establishment of the Chancellor's equitable jurisdiction.

(*r*) Spence, Eq. Juris., i. 346.

(*s*) 17 Ric. II. c. 6.

(*t*) Lord Campbell, Chancellors, i. 257.

(*u*) Spence, Eq. Juris., i. 345. Suits in chancery were commenced by petition or bill, without any preliminary writ, followed by a subpœna summoning the party complained against to appear before the court and make answer. Disputed facts might be established by the personal examination of the parties on oath, a proceeding unknown to the common law, but employed by this tribunal and by the Council from which it branched off.

ments of the chancery. But from the time of Edward IV., although the judges still disputed the chancellor's authority to interfere with the proceedings of the common law courts, we do not trace any further opposition on the part of the commons; and down to the reign of Charles II. the court continued to be substantially the same as it was in the reign of Edward IV. (*w*).

Magnum Concilium.

The Continual or Ordinary Council has been considered with reference to its independent jurisdiction; but it was also equally conspicuous in its relation to the High Court of Parliament. The growth of the national parliament has yet to be considered; but we may anticipate so far as to note that even after the permanent establishment of a parliament of the three estates under Edward I., the baronage, spiritual as well as temporal, still retained, independently of parliament, certain powers which had been theirs when they alone constituted the *Commune Concilium Regni*, and which they ultimately transmitted to the House of Lords (*x*). Under the title of *Magnum Concilium Regis et Regni* they continued to meet at intervals during the thirteenth and fourteenth centuries, sometimes in conjunction with the King's Continual Council, and occasionally also in an assembly containing all the elements of parliament, "summoned to meet, but not under the proper parliamentary style." As the commons took no part in the judicial power of parliament (*y*), its function as the king's great and extraordinary court of justice was performed by the King's Great Council, the lords' house in parliament blended with the Ordinary Council. It is from the mixed powers of this assembly, and the double capacity of the peerage as members both of the parliament or legislative council and of the deliberative and judicial council, that the House of Lords derived its judicial character as a

Origin of the judicial character of the House of Lords

(*w*) Palgrave, Authority of the King's Council, 97; Spence, Eq. Juris., i. 349.

(*x*) Stubbs, Const. Hist., ii. 273.

(*y*) The commons acknowledged in the first Henry IV. that they had no right to interfere in judicial matters (Rot. Parl., iii. 427; Lords' Report, 1823, p. 360); but in the next reign they began to concern themselves with the petitions of private individuals to the lords or Council, which in many instances were passed in the form of statutes with the express assent of all parts of the legislature. Hence originated *private* Acts of Parliament.—See Hallam, Midd. Ages, iii. 92.

court of appeal (*z*), and the Privy Council its legislative character, which it attempted to carry out in the shape of ordinances (*a*). The judges and other official members of the king's Continual Council originally attended as constituent members of the Great Council, and in that capacity, although not peers, seem to have had the right of suffrage (*b*); but under Edward III. or Richard II. the lords successfully asserted their ascendancy over the judges and rest of the Council, and took the decisive jurisdiction into their own hands (*c*). Their ancient colleagues of the Council, not being lords, were thus reduced to the position of assistants and advisers, a position which they have ever since held in the judicial proceedings of the Upper House, the heir and representative of the mediæval Great Councils.

and of the legislative character of the Privy Council.

The original tribunal, the king's Continual Council, retained throughout its extraordinary jurisdiction. After throwing off as branches or offsets the court of Requests (*d*), and the more famous court of Star Chamber, it transmitted its judicial powers to the Privy Council, by whom, through

Judicial powers of Privy Council.

(*z*) "The king's delegated sovereignty in the administration of justice, rather than any intrinsic right in the Peerage, is the foundation on which the judicature of the Lords must be supported."—Hallam, Midd. Ages, iii. [144]. But the House of Lords may also be regarded as inheriting the judicial functions of the Witenagemot. [On "Judicature of the House of Lords," *cf.* Pike, Const. Hist. of House of Lords, pp. 279 *seq.* "As the various Courts of Justice separated themselves from the old *Curia Regis*, the judicial functions of the Prelates and Temporal Lords necessarily underwent a change. . . . There were three distinct stages in this transformation—that in which the other courts of justice diverged from the *Curia Regis* and Council, that in which the Council separated from Parliament, and that which followed the separation. . . . When no Parliament was sitting, however, the petitions of the parties could not be presented, and it was apparently to remedy this evil that an Act was passed in the fourteenth year of Edw. III. It was provided that upon the meeting of every Parliament there were to be chosen a prelate, two earls, and two barons, who . . . were to have power to direct the justices."—ED.]

(*a*) Stubbs, Select Chart., Introductory Sketch, 23.

(*b*) Hale, Jurisdiction of the Lords' House, ed. by Hargrave, pp. 6, 8.

(*c*) Palgrave, King's Council, 54; Hallam, Midd. Ages, iii. [144].

(*d*) The Court of Requests, a minor court of equity, is supposed to have had its origin in an order of the 13th Richard II. for regulating the Council, by which the lords of the council were to meet between eight and nine o'clock, and the bills of the people of *lesser charge* were to be examined and despatched before the Keeper of the Privy Seal and such of the Council as should be present for the time being. This court continued to be resorted to down to the 41st of Elizabeth, when it was virtually abolished by a decision of the Court of Queen's Bench. It was legally dissolved at the same

the medium of a Judicial Committee (*e*), they are still exercised.

Origin of court of Star Chamber.

As regards the origin of the court of Star Chamber, it has already been mentioned that in the reign of Edward III. the king's Continual Council was in the habit of sitting in what was called the Star Chamber [*Chambre d'Estoiles*, or *Chambre des Estoylles*] (*f*). After the establishment of the court of Chancery as a separate and independent jurisdiction taking cognisance of the greater portion of the civil business of the Council, the latter body appears to have usually sat in the Star Chamber while exercising jurisdiction over such cases as were not sent to the chancery. "The continual complaints of the Commons," says Lord Hale (*g*), "against the proceedings before the Council in causes civil and criminal, although they did not always attain their concession, yet brought a disreputation upon the proceedings of the Council, as contrary to Magna Carta and the known laws," and the jurisdiction appears to have gradually declined till the time of the Tudors. Henry VII., apparently prompted by a desire to restore in a new and more legal form a jurisdiction which had now become almost obsolete, created, in the third year of his reign, a new court, sometimes inaccurately called the court of Star Chamber. This new court consisted of the chancellor, treasurer, and lord privy seal, and any other two of them, as judges, together with a bishop, a temporal lord of the council, and the two chief justices, or in their absence two other justices, as assistants (*h*). By a later statute,

New court instituted by Henry VII.

time as the court of star chamber in 1640, though the court lingered for two years longer.—Palgrave, King's Council, ii. 70, 79; Spence, Eq. Juris., i. 351. [See also Ridges, Const. Law, 2nd ed., 1915, p. 244.—Ed.]

(*e*) The Judicial Committee of the Privy Council was established by 3 & 4 Will. IV. c. 41. After hearing the allegations and proofs the Committee make their report to the Queen in Council, by whom the judgment is finally given. [The original Act—3 & 4 Will. IV. c. 41—was the work of Lord Brougham (see Greville's Memoirs, 1st series, vol. ii., p. 364). It has been amended in some respects by the Appellate Jurisdiction Acts of 1876 (39 & 40 Vict. c. 59) and 1887 (50 & 51 Vict. c. 70). By the Judicial Committee Amendment Act, 1895 (58 & 59 Vict. c. 44), Privy Councillors, who have been colonial chief justices or justices or judges of colonial superior courts, are, to the number of five, but no more, enabled to sit on the Judicial Committee.—Ed.]

(*f*) *Supra*, pp. 155 *seq.*

(*g*) Jurisdiction of the Lords' House, 39 [Hargrave; Lond. 1796.—Ed.]

21 Henry VIII. c. 20, the president of the council was added to the number of the judges. Neither in this statute, nor in that of the 3rd Henry VII., is the name of Star Chamber applied to this court; but as most, if not all, of its members were also members of the king's Continual, or as it was now termed Privy, Council, it was practically a judicial committee of that body. It continued to exist as a distinct tribunal from the Privy Council till towards the close of the reign of Henry VIII.; but in the meantime, probably during the chancellorship of Wolsey, the jurisdiction of the ancient Star Chamber (*i.e.*, the Council sitting for judicial business) was revived, and in it the limited court erected by Henry VII. became gradually merged. In the revived court, the lord chancellor (as president), the treasurer, lord privy seal, and the president of the council, still continued to sit, but with them were associated all other members of the Council, and, at one time, apparently, all peers spiritual or temporal who chose to attend. Under the Stuart kings the court was practically identical with the Privy Council, thus combining in the same body of men the administrative and judicial functions (*i*).

The old Star Chamber revived under Henry VIII.

The Star Chamber exercised a jurisdiction analogous, in principle and procedure, to that of the court of chancery, and founded on the inefficiency of the ordinary tribunals to do complete justice in criminal matters and other offences of an extraordinary or dangerous character. Its civil jurisdiction comprised disputes between alien merchants and Englishmen, questions of prize or unlawful detention of ships, and other matters of maritime law; certain testamentary causes, and suits between corporations. These were gradually absorbed by the admiralty, chancery, and common law courts, leaving to the Star Chamber its criminal jurisdiction: which, greatly extended under

Nature of its jurisdiction.

(*h*) 3 Hen. VII. c. 1.

(*i*) [The Star Chamber was only a committee of the Privy Council, and accordingly every privy councillor could occasionally take part in the proceedings, and even the whole body sit as Star Chamber, as was done originally in important cases; which, at all events from Edward VI., was the general rule. Hence this penal jurisdiction became quite an ordinary portion of the political business of the ministerial council. See Gneist, Hist. Engl. Const., p. 505; Leadam, Select Cases in the Star Chamber (Selden Society), 1902; and Maitland, Const. Hist., pp. 261-64.—Ed.]

James I. and Charles I., rendered that court "so potent and so odious an auxiliary of a despotic administration." As a court of "criminal equity," it took cognisance of forgery, perjury, riot, maintenance, fraud, libel, and conspiracy; and generally of all misdemeanours, especially those of a public nature, among which were included all breaches of proclamations, without regard to the illegality of the proclamations themselves. Fine and imprisonment were the usual punishments inflicted; but the court was held competent to pronounce any sentence short of death. The fines were frequently of enormous amount, and though, as a rule, they were reduced or remitted, they in many cases proved ruinous to the sufferers. Under the Stuart kings the pillory, whipping, and cruel mutilations were inflicted upon political offenders by the sentence of this court; and at length the tyrannical exercise and illegal extension of its powers became so odious to the people that it was abolished by the Long Parliament in 1640 (*k*).

Its punishments.

Abolished in 1640.

POLICE AND MILITARY ORGANISATION.

One of the special characteristics of the English constitution — the permanence combined with progressive development of its primitive institutions — is illustrated by the system which we find in use under the Norman and Plantagenet kings, for the preservation of the internal peace of the country, and its defence against hostile invasion. There were two principal methods by which these ends were attained in ancient times, the one civil, the other military: (1) The police organisation of the mutual *frithborh*, or frankpledge, supplemented by the "hue and cry" in pursuit of offenders, in which all the inhabitants of the hundred or tithing were bound to join: (2) the *fyrd*, or national militia, available not only for the defence of the country, but for the maintenance of peace at home. Service in this national force was one of the three duties — the *trinoda necessitas* — to which all allodial proprietors were subject. These primitive institutions, which may be traced to the laws of Edgar-Cnut,

The *frithborh*.

The *fyrd*.

(*k*) 16 Car. I. c. 10. See Palgrave, Essay upon the Original Authority of the King's Council; and Hallam, Const. Hist., i. 48, ii. 29. [*Vide* Hale's Jurisdiction of the House of Lords; and Marquardsen, Münchener Krit. Vierteljahrschrift, 1860, pp. 213-219.—ED.]

and had probably been customary for some centuries, are all met with in full vigour long after the Norman conquest, "working their way through the superstratum of feudalism and gaining strength in the process" (*l*).

The *fyrd*, the armed folk-moot of each shire, was originally the only military system known to our ancestors. The Danish conqueror, Cnut, introduced the germ of a standing army in the body-guard with which he surrounded himself, composed of mercenaries drawn from various nations. But these *hus-carls* were not very numerous, being variously estimated at from three to six thousand. The limited period of service to which the feudal vassals were bound by tenure, and their general unmanageableness, caused both William the Conqueror and the succeeding Norman and early Angevin kings to employ mercenary forces, who, however, soon became odious in the eyes of the nation, and had eventually to be given up. Throughout this period the ancient national militia, though thrown into the shade for a time by the feudal and mercenary troops, still subsisted, and occasionally did good service in defence of their country, as in the battle of the Standard, in 1138, which was won by their exertions, and again in 1174, at the battle of Alnwick. The introduction of scutage, on the occasion of the Toulouse war in 1159, as a commutation of personal service, had the effect of diminishing the feudal levies; and although Henry II. was enabled with the money thus obtained to hire mercenaries for his foreign wars, the hatred of the English towards these forces prevented him from employing them for the purposes of home defence, while the feudal army, besides being insufficient, was too much under the influence of the barons, whose power he was bent upon curtailing. Under these circumstances, the king determined to resuscitate the ancient national force. By the Assize of Arms, issued in the year 1181, in addition to requiring every military tenant to possess a coat of mail, with helmet,

The hus-carls of Cnut.

Mercenary troops.

Assize of Arms, 1181.

(*l*) Stubbs, Select Chart., 459. Although not an essential part of the constitution, these early methods of ensuring peace and defence "are ancient buttresses of the fabric, and their very permanence attests as well as sustains the corporate identity of the English nationality, which feudalism has disguised, but has not been able to mutilate."—*Ibid.* 362.

The ancient *fyrd* revived.

shield, and lance, for every knight's fee which he held in demesne, it was ordained that every free layman having chattels or rent to the value of sixteen marks should be armed in like manner; that he who was worth only ten marks should possess a habergeon, an iron skull cap, and a lance; and that all burgesses and the whole community of freemen ("tota communa liberorum hominum") should furnish themselves with doublets of mail, iron skull caps and lances. To enforce this, the itinerant justices were charged to ascertain, by the recognition of a jury of lawful knights, or other free and lawful men of the hundred or borough, the value of the rents and chattels of all freemen, and to enrol their names in separate classes, with the nature of the arms appertaining to each: and then, after causing the schedule to be read in open court, to oblige all to swear that they would provide themselves with these arms within a stated time, and be true and faithful to the king (*m*).

Amalgamation of the allodial and military systems.

The two military systems, the ancient allodial and the more modern feudal, continued for some time side by side without coalescing, but tending more and more to amalgamate into the general national armament which we meet with under Henry III. and Edward I.

In 1205, a writ of King John, issued in accordance with a provision of the Commune Concilium Regni (*n*), directs that every nine knights throughout England shall provide a tenth well equipped with horses and arms for the defence of the kingdom, and shall contribute two shillings per diem for his keep. This tithe of knights is to repair to London three weeks after Easter, ready to go wherever ordered, and to remain in the king's service, for the defence of the kingdom as long as need shall require. So far, the military tenants only are affected; but a connection with the national militia is traceable in the provision which follows, that in case of foreign invasion, "all men shall unanimously hurry to meet the enemy with force and arms, without any excuse or delay, at the first rumour of their coming"; and also in the penalties for neglect,

(*m*) Benedict. Abb., i. 278; Hoveden, ii. 261.

(*n*) "Cum assensu archiepiscoporum, episcoporum, comitum, baronum, et omnium fidelium nostrorum Angliae." Sel. Chart., 273.

which were, in the case of a knightly or other landholder (unless his absence had arisen from infirmity), the absolute forfeiture by him and his heirs of the land which he held: in the case of knights or others having no land, perpetual slavery for them and their heirs ("ipsi et hæredes sui servi fient in perpetuum"), with the obligation to pay an annual poll tax of four pence each.

In the following reign we find the two military forces amalgamated for the purposes of national defence. In 1227, a writ, issued during the minority of Henry III., shortly after the battle of Lincoln, and while Louis of France was still in the country, directs the sheriff of Berkshire to bring up the whole force of his county, both the feudal levy and also the *jurati ad arma*, the ancient local militia as reorganised under the Assize of Arms (*o*). In 1231 the plan already adopted in the case of the military tenants, of dispensing with the personal service of a part on the condition of contributing to the equipment of the remainder, was applied to the 'jurati ad arma' (*p*).

Expansion of the ancient police organisation.

Concurrently with the development of the ancient *fyrd*, the primitive police organisation had also been undergoing a process of expansion. The system of frankpledge was maintained with even increased stringency. It was enforced by an injunction of William the Conqueror, and by the Assize of Clarendon under Henry II. (*q*). By a royal decree issued in 1195, by Archbishop Hubert, Richard I.'s chief justiciar, the "hue and cry" was enforced, and knights were assigned to receive the oaths for the preservation of the peace. All men above the age of fifteen years were required to swear to keep the peace to their lord the king: to be neither themselves outlaws, robbers, or thieves, nor to aid such persons as receivers or consenting parties; to follow up the hue and cry in pursuit of offenders, and seize as malefactors all who failed to join or withdrew from the pursuit, and to deliver them to the sheriff, from whose custody they should not be

(*o*) Report on Dignity of a Peer, App., p. 2.
(*p*) Rymer, i. 200; Select Chart. [272], 334, 350.
(*q*) Stat. Will. Conq., 8; Assize of Clarendon, c. 9, 10, 15, 16; Select Chart., 81, 138-139.

liberated except by order of the king or of his chief justice (*r*).

Conservators of the peace.

In this appointment of knights to receive the oaths may probably be discerned the germ of the office of conservator of the peace. *Custodes pacis* were assigned in 1253 and 1264 (*s*). They afterwards appear to have been occasionally chosen by the landholders of the county, but were finally appointed to their office by the royal writ or commission (*t*). By an Act of 1 Edward III. (st. 2, c. 16), it was ordained that for the better maintaining and keeping of the peace in every county, "good men and lawful, which were no maintainers of evil or barretors," should be *assigned* to keep the peace; and a later statute in the same reign (34 Edward III. c. 1) "gave them the power of trying felonies, when they acquired the more honourable appellation of Justices of the Peace" (*u*).

County coroner.

The office of county coroner had already been instituted under Richard I., in 1194 (*w*). [It is regulated partly by

(*r*) R. Hoveden, iii. 299. In Edgar's Ordinance of the Hundred (*flor.* 959-975) it was ordered: "That a thief will be pursued. . . . If there be present need, let it be made known to the hundredmen, and let him make it known to the tithingmen, and let all go forth to where God may direct them to go. Let them do justice on the thief, as it was formerly the enactment of Edmund." And in Cnut's Secular Dooms, c. 21: "And we will that every man above xii. years make oath that he will neither be a thief nor cognizant of theft."—Select Chart., 69, 73. ["The later exercise of it is shown in Magna Carta, in Fleta, ii. 52, 72; Britton, c. 29; Horne's Mirror, c. 1, s. 16. The institution was not introduced in those provinces lying north of the Trent (Palgrave, ii. 123), which fact seems to prove that it proceeded from the Conqueror himself, at a time when those northern provinces had not yet become included in the Norman government." Gneist, Hist. Engl. Const., p. 153, note.—Ed.]

(*s*) See the writs in Rymer, i. 291, 292, 442; Select Chart., 365, 402.

(*t*) Palgrave, Eng. Com., p. 300.

(*u*) Stephen's Commentaries (16th ed., 1914), ii. 736. ["There is no limit to the number of justices that may be appointed in any county. Justices are appointed by the Crown on the recommendation of the Lord-Lieutenant. They are unpaid; they elect their own chairman."—Blake Odgers, Local Government, 2nd ed., p. 206. The Justices of the Peace Act, 1906 (6 Edw. VII. c. 16), removed the property qualification of county justices, which from 1875 (38 & 39 Vict. c. 54) had been fixed at the occupation of a private dwelling-house assessed at £100 per annum. For origin of this office, *cf.* Reeves, Hist., ii. 472; iii. 216, 242; iv. 154; also First Report on Constabulary Force (1830), pp. 192-202; and the old work of Lambard, Eirenarchia.—Ed.]

(*w*) Forma procedendi in placitis Coronæ Regis, c. 20; Hoveden, iii. 262. The coroner, *coronator*, is so called "because he was formerly charged with

common law, partly by a series of statutes, fifty-one in number, from 1276 down to 1888. Although their name would imply that they were appointed by the crown, the coroners have always been elective officers. Till 1888 they were always elected by the freeholders, "commons of the counties," in full county court. They are now appointed by the county council.] (*x*).

In 1233, the old police organisation, proving inadequate, was supplemented by a system of watch and ward in every township throughout the country (*y*). Twenty years later, further regulations were issued extending and enforcing the watch and ward, and combining it, for the preservation

Watch and ward. 1233.

Watch and ward and Assize of Arms. 1252.

keeping the pleas of the Crown . . . and in this light, the Lord Chief Justice is the principal coroner of the Kingdom; and may, if he pleases, exercise the jurisdiction of a coroner in any part of the realm."—Stephen's Commentaries (16th ed., 1914), ii. 727. In 1276, the duties of the coroner were minutely described by Stat. 4 Edw. I. stat. 2, *De Officio Coronatoris*. [*Cf.* C. Gross, in Political Science Quarterly, vol. vii., where evidence is adduced to show that the office of coroner must have existed before 1194.]

(*x*) ["Boroughs that have a separate Court of Quarter Sessions, and had, according to the census of 1881, a population of not less than 10,000, elect their own coroners. There are also certain franchises and liberties, which have coroners of their own, called franchise coroners, and within whose precincts the county coroner cannot act. In such places the coroner is usually appointed by the lord of the manor; but in one franchise in Cheshire the office is said to go with an hereditary horn. In a manor in Essex the tenants appoint. In another franchise the Ecclesiastical Commissioners appoint. The coroner of the Admiralty of England is appointed by the President of the Admiralty Division of the High Court; the coroner of the King's Household by the Lord High Steward. Although the office is judicial in its nature, no professional qualification is required. The statutes of Edw. I. and Edw. III. merely insist on coroners being 'sufficient men,' 'chosen of the most meet and lawful people that shall be found in the said counties to execute the said office.' The only other requisite is that the candidate should possess some freehold interest in the county. A share in a freehold grave has been held sufficient. A county coroner ordinarily holds office for life, but may be removed by the Lord Chancellor for misconduct or incompetence. . . . Coroners formerly held inquisitions concerning wrecks, treasure trove and deodands, but this part of their jurisdiction is now obsolete. . . . The main function of every coroner is to hold an inquest over the body of any person who has been killed, or who has died in prison, or who has died suddenly, if the cause of death be unknown. The inquisition must be held *super visum corporis*. . . . The jury must consist of not less than twelve, nor more than twenty-three, good and lawful men."—W. Blake Odgers, Local Government (London, 1909; 2nd ed., pp. 204, 205); see Maitland, Const. Hist., pp. 43, 44; R. H. Wellington, The King's Coroner, 2 vols. (1905-6).—Ed.]

(*y*) Writ of Hen. III. to the Sheriff of Kent: De forma pacis conservanda. Rymer, i. 209.

of internal peace, with the Assize of Arms. (1) Watch was to be kept from sunset to sunrise between Ascension Day and Michaelmas; in the cities by companies of six good and strong armed men stationed at every gate, in the boroughs by a company of twelve, and in the townships by six, or four at least, according to the number of the inhabitants. Any stranger attempting to pass through was to be arrested till the morning, and then, if suspected of any crime, delivered to the sheriff and kept in custody and liberated "per legem terræ." Even a stranger who arrived by daylight was not to remain in any village, except during harvest-time, unless his host would become surety for his conduct. A merchant on his road was entitled, after counting his money in the presence of the mayor and bailiffs of any city or borough, to demand of them a guard "per malos passus et loca ambigua," and if subsequently robbed, could claim restitution from the inhabitants. With the exception of those specially deputed to guard the king's peace, no persons were to be allowed to carry arms. (2) The Assize of Arms was renewed and the classification remodelled, all men, "citizens, burgesses, free tenants, villeins, and others," between the ages of fifteen and sixty, being ranked according to the value of their land or movables, from fifteen pounds annual rent in land down to forty shillings in chattels (*z*). (3) All these were sworn to provide themselves with the arms proper to their class, and ordered to join the hue and cry whenever required. For this purpose they were placed under the command of the local civil authorities, the mayor and bailiffs in cities and boroughs, and the constable in each township, the supreme authority over all being vested in the chief constable of each hundred (*a*).

Statute of Winchester, 1285.

Under our English Justinian, Edward I., whose "legislation is so full that the laws of the next three centuries are little more than a necessary expansion of

(*z*) The owner of land worth £15 a year, and the owner of chattels of the value of 60 marks (£40), were classed together with respect to their armour, and served in what may be termed the "Yeomanry Cavalry" of that period. Each had to provide himself with a coat of mail, an iron head-piece, sword, small knife, and a horse. The other classes served on foot.

(*a*) Writs of 36 & 37 Hen. III. (1252-1253): Rymer, i. 281, 291; Select Chart., 362, 365.

it" (*b*), the celebrated Statute of Winchester (*bb*), which though now to a great extent obsolete has been the foundation of modern laws, elaborated and completed the various regulations for watch and ward, reception of strangers, hue and cry, and the Assize of Arms. It was also specially provided that the whole hundred where any robbery should be committed should be answerable for the damage, unless the felons be brought to justice; and that highways leading from one market town to another should be widened, "so that there be neither dyke, tree nor bush, whereby a man may lurk to do hurt," within 200 feet of each side of the road.

The provisions of the Statute of Winchester with respect to the arming of the men of each county were more immediately directed to the preservation of internal peace, by rendering more effective the power of summoning the *posse comitatus*, which the sheriff, as chief conservator of the peace of the county, had always possessed. But these local forces still continued available for the purposes of national defence: and from the thirteenth down to the middle of the sixteenth century, it was customary, whenever invasion was apprehended from Scotland or France, to empower special "Commissioners of Array" to muster and train all or a portion of the men of each county capable of bearing arms, and to hold them in readiness to defend the kingdom.

Commissioners of Array.

The ancient obligation to keep sufficient arms according to each man's estate was enforced by statutes of Philip and Mary, and the kind of weapons changed for those of more modern fashion (*c*): but under James I. these provisions

Obligation to keep arms enforced by Acts of Philip and Mary.

(*b*) Stubbs, Select Chart., Introd. 35.

(*bb*) 13 Edw. I. c. 6, 1285.

(*c*) 4 & 5 Phil. and Mary, c. 2 and c. 3. Penalties were imposed on persons absenting themselves when commanded to muster by the sovereign, or any *lieutenant* authorised for the same. This was a new officer, the lord-lieutenant, introduced in this reign as the chief military officer of the Crown in every county. For the military purposes of each county the lord-lieutenancy may be regarded as a revival of the office of the old English *earl*. Thenceforward the sheriff became practically a purely civil officer. By the Army Regulation Act, 1871 (34 & 35 Vict. c. 86, s. 6), the jurisdiction and command of the lords-lieutenant of counties over the militia and other auxiliary forces have been revested in the crown, to be exercised

were abrogated (*d*). In 1638 Charles I. issued an unconstitutional Order in Council obliging every freeholder whose land was of the clear yearly value of £200 to furnish a horse-soldier when called upon to do so by the lord-lieutenant of his county. The command of the Militia, as the local forces were usually denominated, formed the final ground of rupture between Charles and his parliament, the latter having passed ordinances (Feb. 26 and March 6, 1642) superseding the king's commissions of lieutenancy by the appointment of fifty-five Commissioners of Array, with power to suppress "all insurrections, rebellions, and invasions." This proceeding, however necessary it may have been at the time for the peace and safety of the kingdom, was clearly illegal. After the Restoration, an Act of Parliament declared that the sole supreme government of the militia and of all forces by sea and land, and of all forts and places of strength, was, and by the laws of England ever had been, the undoubted right of the kings and queens of England, and that neither house of parliament could pretend to the same, nor lawfully levy war, offensive or defensive, against the king (*e*). By another Act, provision was made for calling together, arming, and arraying the militia, by the king's lieutenants of counties, and for charging the cost upon the landholders in proportion to the value of their estates (*f*). But concurrently with the growth of a standing army (*g*), the local forces languished for a lengthened period, until revived and remodelled in 1757, in consequence of a panic caused by rumours of a French armament, as the national militia (*h*).

The Militia

Standing army.

through the secretary of state for war, and officers appointed with his advice.

(*d*) 1 Jac. I. c. 25, s. 46.

(*e*) 13 Car. II. st. 1, c. 6.

(*f*) 14 Car. II. c. 3.

(*g*) [A standing army under the direct command of the crown was, as a result of suppression of the great rebellion, regarded as a menace to free rights of the people. Hence extraordinary powers annually renewable under strict conditions were granted to the crown by the Mutiny Act (2 Will. and Mary, c. 5). The standing army was, however, made a national institution. See *infra.*, chap. xv., *in init.*—Ed.]

(*h*) Hallam, Const. Hist., ii. 133; iii. 259.

Militiamen were to be chosen by ballot to serve for a limited number of years, but were not to be compelled to leave their own county except in case of invasion or rebellion. In 1829, the practice was commenced, and has ever since been continued, of passing an annual Act suspending the militia ballot, the supply being furnished by voluntary enlistment. But the same Act which temporarily suspends the law empowers the King in Council at once to order a ballot should necessity require it. By 2 William and Mary, cap. 2 (amended by 1 Geo. IV. cap. 90, and 7 & 8 Geo. IV. cap. 65), the Lords Commissioners of the Admiralty are vested with all the jurisdictions and powers formerly vested in the Lord High Admiral of England.

Lord High Admiral and Court of Admiralty.

[This ancient officer of high state rank was originally, and long before a navy, as such, existed in England, president of a sovereign court, with competence to hear and determine summarily all causes relating to the sea and to take cognisance of all offences committed thereon. The "laws of Oléron" (Rôles, Jugements et Lois d'Oléron), a collection of ancient rules and usages issued by the Maritime Court of that island, lying off the west coast of France, had already been introduced into England by Henry II., and were adopted as a standard whereby maritime causes should be determined (*i*). The office of Lord High Admiral is first heard of in the reign of Edward I., and the first admiral, known as "Admiral de la Mer du Roy d'Angleterre," was William de Leyburne in 1286. Yet it is only from 34 Edward III. that we find an uninterrupted succession of admirals holding this office. It does not seem to have been essential that the Lord High Admiral should be a sailor: indeed, the Duke of Richmond, natural son of Henry VIII., was appointed such admiral when he was but six years of age. "When the High Admiral went to sea in person, he had usually a commission under the Great Seal appointing him Admiral and Captain

(*i*) [*Cf.* Cleirac, Les Us et Coustumes de la Mer (Bordeaux, 1647); Art. "Sea Laws" in Encyc. Brit., 11th ed., vol. xxiv., pp. 535-537; Reeves, Hist. of Engl. Law, iii. 369; R. G. Marsden (Ed.), Documents relating to Law and Custom of the Sea, 2 vols (London, 1915-16).—Ed.]

General of the Fleet, sometimes with powers to confer knighthood and generally to punish with life and limb" (*k*).

Laws of Oléron.

The laws of Oléron (above mentioned) were supposed to be a transcript of the Rhodian laws (*kk*), and were a code of maritime usages, which in process of time became observable as customary laws by the majority of seafaring nations in the western world (*l*).

The jurisdiction of this court of Admiralty became so far-reaching, and "encroached so much upon the domain of the common law tribunals" (*m*), that in the reign of Richard II. and Henry IV., statutes were passed for restricting the scope of its powers. However, the High Court of Admiralty continued throughout the middle ages as a court taking cognisance of all causes relating to maritime matters, which were without the pale of the common law courts of the country, and thus its jurisdiction extended over all the high seas. Formerly exercising both criminal and civil jurisdiction, it was deprived of the former on a report of a select committee on the High Courts of Admiralty in 1833. The common law courts then took cognisance of all criminal offences which could be tried before these tribunals, and the judge of the High Court of Admiralty, the lineal successor of the Lord High Admiral, had not, although he might sit with the other commissioners of oyer and terminer, a separate and independent criminal jurisdiction. By the Judicature Act of 1873 the jurisdiction hitherto exercised by the court of Admiralty became merged in that of the High Court of Justice (*n*).—Ed.]

(*k*) F. W. Rowsell, in article "Admiral," in Encyc. Brit., 9th ed.; see also Encyc. Brit., 11th ed.

(*kk*) [See W. Ashburner, The Rhodian Sea Law (Oxford, 1909).]

(*l*) The oldest part of these laws of Oléron, consisting of twenty-five articles, emanates from the twelfth century under the Dukes of Guyenne. A document of 1364 proves that at that time they were observed in France, after which they were again administered both in Spain and the Netherlands.

(*m*) Taylor, English Const., p. 550.

(*n*) [See Ridges, Const. Law of England (2nd ed., 1915), p. 250.]

CHAPTER VI.

THE SUCCESSION TO THE CROWN.

The English kingship elective.

THE elective character of the old English kingship, but with the choice exclusively limited, under all ordinary circumstances, to the members of one royal house, has been already discussed in a previous chapter (*a*). The Norman conquest introduced a new dynasty, and a more comprehensive idea of royalty, combining both the national and feudal theories of sovereignty; but it effected no legal change in the nature of the succession to the crown. Election by the National Assembly was still necessary to confer an inchoate right to become king—a right subsequently perfected by the ecclesiastical ceremony of inunction and coronation (*b*). So strongly marked was the elective character of the kingly office that, even after the

(*a*) *Supra*, pp. 31-33.

(*b*) On the origin of coronation and unction, see Stubbs, Const. Hist., i. 162. The ancient English kings were both crowned with a helmet and anointed. "The ceremony was understood as bestowing the divine ratification on the election that had preceded it, and as typifying rather than conveying the spiritual gifts for which prayer was made. That it was regarded as conveying any spiritual character, or any special ecclesiastical prerogative, there is nothing to show: rather, from the facility with which crowned kings could be set aside and new ones put in their place, without any objection on the part of the bishops, the exact contrary may be inferred. That the powers that be are ordained of God, was a truth recognised as a motive to obedience, without any suspicion of the doctrine, so falsely imputed to churchmen of all ages, of the indefeasible sanctity of royalty. The statements of Allen (Prerogative, p. 22) on this point are very shallow and unfair. To attribute the ideas of the seventeenth century to the ages of St. Gregory, Anselm, and Becket, seems an excess of absurdity." *Ibid.* p. 163 and *n.* 2. [For an exact description of the "modern forms" which were observed on the accession and coronation of King Edw. VII., and which in their essential features were continued in those of George V., *cf.* Anson, Law and Custom of the Constitution, 1907, vol. iii., pp. 234 *seq.*: Laws of England (ed. Halsbury), vol. vi., pp. 326-328; *infra*, p. 190, note: the form for the coronation of King Henry VIII.; and L. G. Wickham-Legg, English Coronation Records.—ED.]

choice of the nation had been once made, the form of election was again gone through by the clergy and people assembled in the church at the coronation (*c*). The doctrine of the hereditary descent of the crown gradually grew up, as the territorial idea of kingship superseded the personal idea (*d*), during the two centuries after the conquest. As the king of the English developed into the king of England (*e*), the feudal lord of the land, the kingdom came to be regarded by kings and courtiers as the private possession of the sovereign, to be enjoyed for his own personal profit; and by degrees the feudal lawyers, arguing from a false analogy, applied to the crown the same principles of strict hereditary right which had already begun to regulate the descent of a private inheritance. But the forms of election and coronation still continued, and periodically, as the throne became vacant on the death of each sovereign, bore witness to the fallacy of this legal theory (*f*). Edward II., who succeeded in 1307, was the first king whose reign was dated from the day following the death of his predecessor. In him, then, the principle of hereditary right appeared to have finally triumphed over the old elective system. But the true nature of the crown as an office or trust, and the continuing right

Doctrine of hereditary right.

(*c*) See Maskell, Monumenta Ritualia Ecclesiae Anglicanae, vol. iii.; Freeman, Norm. Conq., iii. 44, 623.

(*d*) *Supra*, p. 42.

(*e*) John was the first who called himself "Rex Angliae" on his Great Seal; all his predecessors had been "Kings of the English."

(*f*) "If the descendants of the Conqueror had succeeded one another by the ordinary rule of inheritance, there can be no doubt but that the forms as well as the reality of ancient liberty would have perished. Owing to the necessity, however, under which each of them lay, of making for himself a title in default of hereditary right, the ancient framework was not set aside; and perfunctory as to a great extent the forms of election and coronation were, they did not lose such real importance as they had possessed earlier, but furnished an important acknowledgment of the rights of the nation, as well as a recognition of the duties of the king. The Crown then continues to be elective: the form of coronation is duly performed: the oath of good government is taken, and the promises of the oath are exemplified in the form of charters. . . . The recognition of the king by the people was effected by the formal acceptance at the coronation of the person whom the National Council had elected by the acts of homage and fealty performed by the tenants in chief, and by the general oath of allegiance imposed upon the whole people, and taken by every freeman once at least in his life."—Stubbs, Const. Hist., i. 366, 367.

of the nation to regulate the succession to it, were signally re-asserted, not twenty years later, by the formal deposition of the unfortunate king. This persistence of the national right to choose the sovereign, the same in principle whether applied to the individual king or to the selected dynasty, we shall now consider somewhat more in detail.

William the Conqueror, 1066.

We have seen how William the Norman found little difficulty, immediately after the battle of Hastings, in procuring his election by the terrified witan. After taking the ancient oath of the English kings, constituting a compact with the nation to govern with justice and equity, he was duly crowned at Westminster by the Archbishop of York (*g*). On his death-bed the Conqueror bequeathed to his eldest surviving son, Robert, the patrimonial Duchy of Normandy. The crown of England he would not attempt to bequeath, declaring that he held it not by hereditary right; he left the succession to the decision of God (*h*). He expressed, however, his ardent wish that his younger and favourite son William should succeed to the kingship of the English, in much the same way as formerly Edward the Confessor had recommended his brother-in-law Harold (*i*). Furnished with a recommendatory letter from his father to Archbishop Lanfranc, as the head of the witenagemot, William Rufus at once hastened to England. Here he was obliged to make a triple promise—to rule his future subjects with justice, equity, and mercy, to protect the rights and privileges of the church, and to conform to the primate's counsels in all things—before Lanfranc would declare in his favour. Having secured this powerful supporter, he was elected king at a meeting of the prelates and barons, in the third week after his father's death, and immediately crowned with the usual solemnities (*k*).

William Rufus. 1087.

Henry I. 1100.

On the death of William Rufus in the New Forest, on August 2, 1100, his younger brother Henry, being close at hand, and having secured the royal treasure, was hastily

(*g*) *Supra*, p. 44.
(*h*) Ordericus Vital., vii. 15.
(*i*) *Ibid.* vii. 15, 16.
(*k*) Eadmer, Hist. Nov., lib. i., p. 13; A.-Sax. Chron., 192; Lingard, ii. 76.

elected king the following day at Winchester (*l*). But although the election was the hurried act of a small number of the barons, it was something more than a mere form. The claims of Henry's absent elder brother, Robert the Crusader, were advanced and discussed. They rested not merely on priority of birth, but upon the wishes of the late king, expressed in the arrangement which he had made with Duke Robert, at Caen, in 1091, that each should be heir to the other in case of his dying childless. Ultimately the arguments of the Earl of Warwick gained a decision in Henry's favour (*m*); and two days afterwards (Aug. 5) he was crowned at Westminster by Maurice, Bishop of London, and took the ancient coronation oath of the English kings (*n*). In the Charter of Liberties, which he issued at the same time, he announces to the nation his coronation "Dei misericordia et communi consilio baronum totius regni Angliae" (*o*).

The male line of the Conqueror became extinct on the death of Henry I. The late king had endeavoured to secure the crown to his own offspring, first by inducing the baronage to do homage and fealty to his son William, and, after the untimely death of the Atheling, by exacting, on three separate occasions, an oath from the prelates and

(*l*) A.-Sax. Chron., *s.a.* 1100.

(*m*) *Ibid. s. a.* 1100. Will. Malmesb. Gesta Regum, v. § 393.

Coronation Oath.

(*n*) The exact words of the oath, agreeing with the ancient form used at the coronation of King Ethelred II., have been preserved: "In Christi nomine promitto haec tria populo Christiano mihi subdito. In primis me praecepturum et opem pro viribus impensurum ut ecclesia Dei et omnis populus Christianus veram pacem nostro arbitrio in omni tempore servet; aliud ut rapacitates et omnes iniquitates omnibus gradibus interdicam; tertium ut in omnibus judiciis aequitatem et misericordiam praecipiam, ut mihi et vobis indulgeat Suam misericordiam clemens et misericors Deus." —Maskell, Mon. Rit., iii. 5, 6; Select Chart., 95. [The ancient form of coronation oath, by which the king swore to maintain the laws and customs which the commonalty of the kingdom shall have chosen—*quas vulgus elegerit les quels la communaute de vostre roiaume aura esleu*—has been at times altered to suit the various circumstances of accession to the throne. See Maitland, Const. Hist., p. 286; J. Wickham-Legg, The Coronation Order of King James I.; English Coronation Records, Introduction xix. The present form of oath, in its salient clause, runs: "Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the dominions thereto belonging, according to the statutes in Parliament agreed on, and the respective laws and customs of the same?"—Ed.]

(*o*) Thorpe, Ancient Laws and Institutes, 215.

barons to acknowledge the Empress Matilda as his successor. This was a stretch of the king's constitutional powers; and the attempt to bind men's consciences more firmly by the triple repetition of the oath would seem to indicate his own distrust. A recommendation to the nation was all he could lawfully give, and it was a moot point whether even this recommendation had not been withdrawn on his death-bed (*p*). Moreover, a woman was incapable of performing the martial duties which then appertained to royalty, and the acceptance of the Empress Matilda practically meant subjection to the rule of her husband, Geoffrey of Anjou—a man obnoxious to the Normans as an Angevin, to both English and Normans as a foreigner (*q*). On the third occasion when fealty had been sworn to the Empress, her infant son, afterwards Henry II., was joined with her, and was nominated by his grandfather to be king after him. But, as the child was little more than two years old when the throne became vacant by Henry's death, he was clearly ineligible. Such being the position of affairs, the prompt action of Stephen of Blois, Count of Mortain and Boulogne (*r*), his personal popularity with the men of London and Winchester, and the great influence of his brother Henry, Bishop of Winchester, ensured his election and coronation (*s*). To call him a usurper is an abuse of the term. His election, like that of his uncle, Henry I., was, indeed, somewhat irregular, few only of the magnates being present (*t*); but the paucity of magnates was counterbalanced by the presence and support of the citizens of London, who might fairly claim to speak on behalf of the commonalty of the realm (*u*), and the election was shortly afterwards confirmed by the adhesion of the great body of the baronage,

Stephen. 1135.

(*p*) Gesta Stephani, p. 7.

(*q*) Cont. Flor. Wig., App.

(*r*) Stephen was a younger son of Stephen, Count of Blois, by Adela, daughter of William the Conqueror. His wife, Matilda, was the daughter and heiress of Eustace, Count of Boulogne, by Mary, younger sister of Matilda, wife of Henry I., and niece of Edgar Atheling.

(*s*) Will. Malmesb., Hist. Nov., i. § 11.

(*t*) *Ibid.*

(*u*) Gesta Stephani, p. 3. *Cf.* also Chron. A.-Sax., *s. a.* 1135; Will. Malmesb., Hist. Nov., i. § 11.

clerical and lay. In the second of Stephen's charters his title to the throne is somewhat elaborately set forth: "Dei gratia assensu cleri et populi in regem Anglorum electus, et a Willelmo Cantuariensi archiepiscopo et sanctae Romanae ecclesiae legato consecratus, et ab Innocentio sanctae Romanae sedis pontifice confirmatus" (*w*). Henry I., in a letter to Anselm notifying his accession to the throne, had in like manner declared himself "nutu Dei a clero et a populo Angliae electus" (*x*). Both kings founded their title on the choice of the people. The confirmation by the pope was probably regarded, in Stephen's case, as a tacit condonation of the breach of their oaths by the king, prelates, and barons, who had all sworn to the late King Henry to support his daughter's claim.

Henry II. 1154.

At the time of Stephen's death, on October 25, 1154, Henry, Duke of Normandy, was absent from England. He returned on December 8, and after an interregnum of nearly two months, was elected and crowned king on the 19th of the same month (*y*). He succeeded without opposition, not by hereditary descent, but by virtue of the recent compact of Wallingford, ratified by the assent and homage of the baronage (*yy*). The kingship was gradually passing out of the elective stage and becoming more feudal in character. Obtaining homage from all the feudatories was thought to give a secure title. The election became, as it were, feudalised in form, and to a great extent in spirit also. The action of Henry I., in exacting homage and fealty, first to his son William and then to his daughter and grandson, has already been noticed. In a similar manner Stephen, in 1152, endeavoured, unsuccessfully, to secure the recognition of his son Eustace as heir to the throne; and Henry II. early procured the baronage to do homage, first to his young son William and then to his son Henry. But he took a further and, as it turned out, most unfortunate step. Not satisfied with the homage of the baronage, which might be regarded as a prospective

(*w*) Statutes of the Realm—Charters of Liberties, p. 3.
(*x*) See Anselm's Letters, lib. iii., Ep. 41.
(*y*) "Ab omnibus electus est."—Rob. de Monte, *s. a.* 1154. *Cf.* Will. Newb., ii. c. 1.
(*yy*) *Supra*, p. 81.

election, he borrowed from the practice of France and the Empires of the East and West the expedient of crowning the son during the lifetime of the father. The young Henry was twice solemnly crowned; on the first occasion in 1170, alone, and again, two years later, in company with his wife, daughter of Louis VII. of France. Under the sinister guidance of his father-in-law he soon assumed the position of a rival and an enemy rather than of an heir-apparent.

Richard I. 1189.

It was only a few days before his death, on July 6, 1189, that Henry II. had recognised his eldest surviving son, Richard Cœur-de-lion, as his successor. Richard remained absent from England about five weeks, engaged in receiving investiture of the duchy of Normandy (July 20), and in concluding a treaty with Philip of France. In the meantime his mother, Queen Eleanor, issued a proclamation to the English, calling upon all freemen to take the oath of allegiance to her son Richard as "*Lord* of England" (*z*). No opposition of any kind was made by prelates, barons, or people, and on September 3, three weeks after he had landed in England, Richard took the usual coronation oaths, and was duly anointed and crowned, with extraordinary splendour and formality, in the presence of the assembled "archbishops, bishops, earls, barons, clergy, and a great multitude of knights" (*a*). In the Annals of Dunstable he is said to have been "elevated to the throne by hereditary right, after a solemn election by the clergy and people" (*b*), words which indicate the mixed notion of hereditary right and popular choice which was then beginning to prevail (*c*).

John. 1199.

Richard I. died without issue on April 8, 1199. After an interregnum of a duration of about six weeks, his

(*z*) Bened. Abbas, ii. 74, 75.

(*a*) *Ibid.* ii. 78.

(*b*) Ann. Dunstapl., *s.a.* 1189 (Annales Monastici iii. pp. 24-25). The earlier portions of the Annals of Dunstable down to 1201 appears to be principally derived from the Abbreviationes Chronicorum, and the Imagines Historiarum of Ralph de Diceto, the latter an original work of a contemporary. [Hardy, Cat. of Brit. Hist., 1871, iii. 252.]

(*c*) By the chroniclers Richard is termed "Earl" from his father's death till his investiture as Duke of Normandy on July 20, thenceforward "Duke Richard" till his coronation on September 3, 1189, when he became for the first time "Rex." His regnal years are reckoned only from this date.

younger brother John, to whom the barons, by Richard's death-bed orders, had already sworn fealty (*d*), succeeded to the throne, with "a questionable title perfected by the election of the nation" (*e*). Even in private inheritances the doctrine of representation, by which the issue of a deceased elder brother would exclude the succession of the surviving younger brother, was as yet unsettled (*f*). In the succession to the crown of England the doctrine had never hitherto obtained. Nearly two centuries had still to elapse before this stage in the growth of hereditary right was distinctly marked by the unopposed succession of Richard II. as heir to his grandfather (*g*). The claim of proximity of blood, which the uncle possessed, was much more obvious in early times than the subtle doctrine of representative primogeniture; and he was usually far better fitted by age, experience, and personal authority, to undertake the onerous duties of mediæval royalty. In England there appears to have been an absence of any feeling in favour of the boy Arthur of Brittany, son of John's elder brother Geoffrey; while John's claim was supported by the death-bed recommendation of the late king, the influence of the queen-mother, and the adherence of a numerous and influential party among the barons. He was elected king without opposition, and crowned at Westminster on May 27. At his election Archbishop Hubert, according to the account given by Matthew Paris, made a very remarkable speech, in which he declared the crown to be absolutely elective, giving even to the members of the royal stock no preference unless founded on their own personal merit (*gg*). The truth of this incident has been doubted by some; but from the mouth of a zealous partisan the speech is by no means improbable. The archbishop, in fact, merely expressed, in

(*d*) Hoveden, iv. 83.

(*e*) Stubbs, Select Chart., Introductory Sketch, 29.

(*f*) Glanvill, l. vii. c. 3.

(*g*) "No opposition was made to the accession of Richard the Second, but there seems to have been a strong notion in men's minds that John of Gaunt sought to displace his nephew. In earlier times, as the eldest and most eminent of the surviving sons of Edward the Third, John of Gaunt would probably have been elected without any thought of the claims of young Richard."—Freeman, Growth of Eng. Const., 213.

(*gg*) Matthew Paris, p. 107.

very plain language indeed, what had been the theory of the constitution down to the time of Earl Harold, in whose person the theory was practically exemplified; and what, if we except the denial of any preference to members of the royal house, had actually been the ordinary practice both before and since the conquest (*h*). In the preamble of a charter issued by John shortly after his accession he was careful to unite both his titles: "Rex jure haereditario, et mediante tam cleri et populi consensu et favore" (*i*).

Henry III. 1216.

There was every probability that a justly incensed nation would have compelled the House of Anjou to yield the throne of England to a new dynasty, when the death of John on October 19, 1216, removed the chief cause of offence, and gave his family one more chance before it was too late. The young Henry was hastily crowned at Gloucester on October 28, by the legate Gualo (*k*); but he owed his kingdom to the energy and statesmanship of the regent Pembroke, who, by timely concessions, secured, with much difficulty, the adhesion of the majority of the nation (*l*). Arthur of Brittany had left a sister Eleanor, known as the "damsel of Brittany," who survived till 1241, but she seems never to have been regarded as having a claim to the succession (*m*).

(*h*) "Matthew Paris supposes that the archbishop, warned of John's utter faithlessness and foreseeing the troubles of his reign, wished to impress upon him and upon the people that as an elected king he must do his duty under pain of forfeiture. But the speech of Hubert was probably in itself nothing more than a declaration of John's fitness to be elected, the recollection of which would naturally recur to those who heard it when they found out how unfit he was to reign. The enunciation, however, of the elective character of the royal dignity is of importance, whether it be due to the archbishop or to the historian."—Stubbs, Const. Hist., i. 554.

(*i*) Rymer, i. 76.

(*k*) Ann. Waverl., p. 286. At the coronation only Gualo the Legate, the Bishops of Winchester, Worcester, Coventry, and Bath, and the Earls of Chester, Pembroke, and Ferrers, Wm. Brewer and Savary de Maulac were present.

(*l*) *Supra*, p. 123.

(*m*) Both Glanvill and Bracton were inclined to favour the claim of the nephew as against the uncle in the succession to private inheritances. But so long as Eleanor lived the "casus regis" seems to have been regarded as an obstacle in the way of a judicial decision for the nephew. In treating of the writ of entry, Bracton, 327 b., says expressly, "et cum de propinquitate constiterit *quamdiu casus regis duraverit* nunquam ad judicium proceditur."—Twiss's Bracton, i. xlv.

Edward I. 1272.

Down to Henry III. inclusive the reign of each king is dated from his coronation only. The interregnum between the death of the old and the coronation of the new king was always made as short as possible, in consequence of the serious inconvenience resulting from the doctrine that the king's peace was interrupted during a vacancy of the throne. But when the coronation was delayed, as happened in the cases of Henry II., Richard I., and John, who had each been absent in France at the death of his predecessor, the regal title was never assumed until the process of election and coronation had been gone through (*n*). Until then they were only entitled "Dux Normanniae," or, as Richard I. was styled in the proclamation issued by his mother (*o*)—and also in a charter granted by him before his coronation, "*Dominus* Angliae" (*p*). Edward I. was the first king who reigned before his coronation. His father, Henry III., died on November 16, 1272, whilst Edward was absent in Palestine. Four days afterwards, when Henry was buried in Westminster Abbey, the Earl of Gloucester, with the prelates and barons, swore allegiance to Edward as king (*q*). His hereditary claim perfected by the fealty of the baronage—the old election in a feudal guise—appears to have been now regarded as conferring the name of king previous to coronation. But the idea of election, and the necessity for consent to a king's accession were still preserved. During the four days which elapsed between the death of Henry and the recognition of Edward as king, the throne was legally vacant. The new king's reign was dated not from the death of his father, but *from the day on which the oath of fealty was taken* (*r*); and in the order for the proclamation of the king's peace, issued in his name three days later by the Royal Council,

(*n*) Nicolas, Chron. of Hist., 272.

(*o*) *Supra*, p. 185.

(*p*) Archæologia, xxvii. 109.

(*q*) Ann. Winton., p. 112. "Magnates regni nominarunt Edwardum filium suum in regem." Annal. Dunst., p. 254. "Recognoverunt paternique successorem honoris ordinaverunt." Rishanger, p. 75. "Nominare" and "ordinare" imply much more than impassive acquiescence in the succession of an heir.

(*r*) Hardy, Introduction to Close Rolls; Nicolas, Chronology of History, pp. 291-2; Allen, Royal Prerogative (ed. 1849), p. 46.

Edward asserts the crown of England to have devolved upon him "successione haereditaria ac procerum regni voluntate et fidelitate nobis praestita" (*s*). Shortly afterwards the oath of fealty was renewed in a great assembly held at Westminster after the feast of St. Hilary, 1273, and attended not only by all the prelates and other magnates of the kingdom, but by four representatives from each county and each city (*t*).

Edward II. 1307.

In the proclamation issued on the accession of Edward II. he was declared to be already king of England by descent of heritage ("ja roi d'Engleterre par descente de heritage"), the words referring to the consent of the magnates of the realm being omitted (*u*). From henceforth the old civil election dropped out, and hereditary succession became the established rule, subject, however, in cases of necessity, to the paramount power of parliament, not only to depose an individual sovereign, but also, for good reason, to set aside the direct line of descent and establish a new royal stock (*w*). The ecclesiastical form of election

Hereditary succession established.

(*s*) Rymer, i. 497. "For the first time," says Stubbs (Const. Hist., ii. 107) of Edward I.'s accession, "the reign of the new king began, both in law and in fact, from the death of his predecessor." With all deference, however, to so eminent a historian, it is evident that although the hereditary claim of Edward was admitted without opposition, yet in law, and in fact, there was actually no king for the space of four days. Indeed, the author had just before told us "that his reign began on the day of his father's funeral." The fact that the regnal years of Edward were dated only from the day of his recognition as king by the baronage marks the persistence of the elective idea, and the difference still recognised between the kingship and a private inheritance. It is important not to antedate the steps in the development of the hereditary doctrine. As Edward I. was the first king who reigned before coronation, so Edward II. was the first whose reign is dated from the day following the death of his predecessor. The theory embodied in the legal maxim "the king never dies" is of still later growth. It may be said to have been practically accepted from the accession of the House of York; yet even Henry VIII.'s reign commenced on the day after the death of his father (Nicolas, Chron. of Hist.). From the accession of Edward VI. there has been no interregnum, however short, except only where the line of succession has been broken.

(*t*) Ann. Winton., p. 113.

(*u*) Rymer, ii. 1. Walsingham (i. 119) says: Successit . . . non tam jure haereditario quam unanimi assensu procerum et magnatum."

(*w*) "Hereditary succession in monarchical states is nothing more than an expedient in government founded in wisdom, and tending to publick utility: and consequently whenever the safety of the whole requireth it, this expedient, like all rules of merely positive institution, must be subject to the controul of the supreme power in every state . . . Title by descent

by the clergy and people survived the civil form, and was maintained, in the coronation service, down to the accession of Henry VIII.; since whose time a mere recognition by the people is all that takes place (*x*). The right of the National Assembly—whether acting as a technically constituted parliament, or as a convention of the estates of the realm—to regulate and vary the succession to the crown, has been constantly claimed and exercised whenever the safety and welfare of the kingdom have imperatively required it. The depositions by the witan of Sigebert in 755, of Ethelred the Unready in 1017, and of Harthacnut in 1037, have already been referred to in a previous chapter (*y*). Since the Norman conquest there had hitherto been no actual case of formal deposition; but we have seen the barons under King John renouncing their allegiance and electing Louis, son of the King of France, to be their king (*z*); and the misgovernment of Henry III. caused a change in the succession to be again mooted amongst the baronage. In 1327, however, Edward II. was formally deposed by the parliament which assembled at Westminster on January 7, 1327, after a bill of six articles, drawn up by Stratford, Archbishop of Winchester, had been exhibited against him. These articles set forth as the reasons for his deposition, that he was devoid of the ability to govern, had suffered himself to be led in all things by evil counsellors, had neglected the business of the state, lost the crown of Scotland, broken his coronation oath, ruined his

But subject to the paramount right of Parliament to settle the succession.

Deposition of Edward II 1327.

was always esteemed by the legislature a wise expedient in government: but in cases of necessity, it was never thought to confer an indefeasible right; because that would have been *to defeat the end for the sake of the means*."—Sir Michael Foster, Discourses on Crown Law (ed. 1792), p. 405.

(*x*) The form for the coronation of Henry VIII., drawn up by that king himself, has been preserved. Hereditary right and elective right are set forth in equally strong terms. Prince Henry is described as "rightfull and undoubted enheritour by the lawes of God and man," but also as "electe, chosen and required by all the three estates of this lande to take uppon hym the said coronne and royall dignitie." The assent of the people is asked thus: "Woll ye serve at this tyme, and geve your wills and assents to the same consecration, enunciation and coronacion? Whereunto the people shall say with a grete voyce, Ye, Ye, Ye; So be it; Kyng Henry, Kyng Henry."—Maskell, Mon. Ritual., iii. 73; Freeman, Norm. Conq., ii. 622.

(*y*) *Supra*, p. 31.

(*z*) *Supra*, p. 122

kingdom and people, and that there appeared no hope of his amendment. The parliament therefore resolved that the Lord Edward, the king's eldest son, should immediately take upon him the government of the kingdom and be crowned king. As an additional precaution, the queen's advisers determined to procure a formal resignation from Edward II. On January 20 a deputation of prelates, earls, barons, abbots, and two judges, waited on the king, then a prisoner in Kenilworth Castle, and, after notifying to him the resolution of parliament, obtained his consent to the election of his son. Then Sir William Trussell, in the name of the rest, and as procurator for the whole parliament, renounced the homage and fealty which the members had severally made to the king, and declared that they should thereafter account him as a private person without any manner of royal dignity. The ceremony ended by Sir Thomas Blount, the steward of the household, breaking his staff of office, as a sign that his master had ceased to reign as completely as if he were dead (*a*).

Edward III. 1327.

In the proclamation of his peace issued on January 24, the twofold title of Edward III., derived from the common counsel and consent of the estates of the realm and the resignation of his father, is carefully set forth. On January 29 he was crowned at Westminster (*b*).

House of Lancaster.

Deposition of Richard II. 1399.

The deposition of Richard II., in 1399, was preceded, as in Edward II.'s case, by a so-called voluntary resignation, and accompanied by Henry of Lancaster's very remarkable claim to the crown, in which an insinuated priority of descent from Henry III., a right of conquest, and the misgovernment of Richard are artfully combined. But the power of the National Assembly to depose and elect the sovereign is brought out with peculiar distinctness in the

(*a*) T. de la Moor, pp. 600, 601; Knyghton, c. 2549; and see Lingard, iii. 345, and Stubbs, Const. Hist., ii. 380. The Parliament Roll, which was produced in Parliament in the 10th year of Richard II. (*infra*, p. 286), is not now extant. ["The person of the king, but not the kingly authority, had at this time succumbed to a combination, which proclaimed the deed of violence with the insolent words: 'the King has forfeited his crown by reason of his incorrigible disposition'; whilst the Archbishop of Canterbury announced these words to the people with the intimation that 'the voice of the people was the voice of God.'" Gneist, Hist. Engl. Const., p. 408.—Ed.]

(*b*) Rymer, ii. 683, 684.

official record entered on the parliamentary rolls. The parliament which deposed him was summoned to meet on September 30, by writs issued in Richard's name on August 19, the same day on which he met the Duke of Lancaster at Flint. Richard, while a prisoner in the Tower, executed a formal deed of resignation on September 29, which was presented to the parliament assembled on the following day. The resignation of the king was held to have the technically legal effect of dissolving the parliament as soon as it had met (*c*), but the Assembly, as the representative of the estates of the realm (*d*), accepted the resignation, deposed the king, and elected his successor. In the record of the proceedings, after reciting Richard's resignation of the crown, the crimes of which he had been guilty, and his general unfitness to be king, the formula of deposition runs: "Propter praemissa, et eorum praetextu, ab omni dignitate et honore regiis, si quid dignitatis et honoris hujusmodi in eo remanserit, merito deponendum pronunciamus, decernimus, et declaramus, et etiam simili cautela deponimus." The throne is then declared vacant: "ut constabat de praemissis, et eorum occasione, regnum Angliae, cum pertinentiis suis vacare." Finally the crown is granted to Henry: "concesserunt unanimiter ut Dux praefatus super eos regnaret" (*e*). The election of Henry IV. was of course determined by special circumstances, yet in one aspect it was but a recurrence to the ancient practice of choosing the worthiest member of the royal house to fill the throne, to the exclusion of the nearest lineal heir, who was a minor (*f*). The accession of Richard II. (1377) had

Election of Henry IV.

(*c*) Fresh writs were consequently issued on September 30 summoning the same assembly to meet as a parliament six days later. Lords' Report on Dignity of a Peer, iv. 768.

(*d*) Walsingham, ii. 234.

(*e*) Walsingham, ii. 234-238; Rot. Parl., iii. 416 *seq.*

(*f*) ["The throne having thus been made vacant, not only by Richard's own act, but by the Act of Parliament, the all-important question of the succession remained to be determined. If that question had depended only on the strict rule of hereditary descent which the feudal lawyers applied to the succession of estates, the Crown would now have passed to Edmund Mortimer. . . . But the strict rule of hereditary descent had not yet received positive and formal recognition in the case of the Crown; it had not yet superseded the immemorial right of the National Council to choose, in the presence of a great emergency, that member of the royal

been, as we have seen, the first instance, in the succession to the crown of England, where the claim of representative primogeniture was preferred to that of proximity of blood. The next lineal heir, on the deposition of Richard II., was the child Edmund Mortimer, Earl of March, the great-great-grandson of Edward III., through Philippa, daughter of Lionel, Duke of Clarence, third son of that king; while Henry IV., the elect of the people, was the son of John of Gaunt, and grandson of Edward III., in the prime of life, and distinguished in both arms and council. Under Henry IV. the right of succesion to the crown was settled, altered, and re-settled no less than four times. In his first parliament—the same which had deposed Richard II. on September 30 and re-assembled under the new king's writs on October 6, 1399—the Lord Henry, Prince of Wales, with the assent of the lords spiritual and temporal and all the commons, was "created and ordained Heir Apparent, to have and enjoy the Realm in time to come when God it should will" (*g*). Four years afterwards, by an Act (5 Hen. IV.) passed in the parliament which met at Westminster on January 14, 1404, the succession was entailed upon the Prince of Wales and the heirs of his body, and in default upon his brothers, the other sons of the king, and their issue in order of seniority (*h*). In addition to his four sons, Henry, Thomas, John, and

The crown entailed on Henry IV. and his issue.

household whom it deemed most competent to govern. And yet the notion that the right to the throne depended upon the hereditary principle had sufficiently advanced to prompt Henry, when he stood forth before the Parliament to challenge the Crown, to claim it 'as that I am descended by right line of blood coming from the good lord King Henry III.'" Taylor, Engl. Const., p. 513; see also Green, Hist. of the English People, vol. i. p. 521; and Freeman, Enc. Brit., 9th ed., vol. viii. p. 320. Maitland, Const. Hist., pp. 191 *seq.*, considers that the deposition of Richard II. has a greater constitutional significance than the deposition of Edw. II. (*supra*, p. 190), in that the charges against him were not those of worthlessness, but accuse him of having also broken the law. "The revolution, if such we call it, is in this case a protest against absolutism."—ED.]

(*g*) Rot. Parl., iii. 434 (*s. a.* 1399, 1 Hen. IV.).

(*h*) Rot. Parl., iii. 525, 575.

The distinction between the generic term "heirs," denoting all heirs, collateral as well as lineal, and the specific term "heirs of the body," which is restricted to lineal heirs alone, is sometimes overlooked by non-legal historians. Even Lingard (Hist., iv. 317) and Stubbs (Const. Hist., iii. 46) are not free from this inaccuracy; and in the case of the latter, who tells us that the succession was settled "on the Prince of Wales and his *heirs*,

Humphrey, Henry IV. had two daughters who appear to have been intentionally ignored in this settlement; the daughters of his sons were, however, capable of inheriting under the entail. Two years later it seems to have been thought desirable to exclude these also, probably with a view to negativing the right of succession through females, which was the basis of title of the young Earl of March. Accordingly, on June 7, 1406, an Act was passed resettling the crowns of England and France on the king and the heirs *male* of his body (*i*); but this restriction being quickly perceived to involve certain inconvenient consequences, the last Act was repealed (*k*) on December 22 in that same year, and the crown was finally settled upon King Henry and the heirs of his body, thus admitting into the line of succession not only his sons and their issue, female as well as male, but also his daughters and their descendants (*l*).

Settling Acts.

The House of Lancaster reigned for more than sixty years by a good parliamentary title. The House of York, by whom the doctrine of indefeasible hereditary right was first promulgated, in order to justify their claims to the throne (*m*), owed their success far less to that doctrine than to their intense personal popularity, their descent in the male line from Edward III., and the dislike which Henry VI. and his consort Margaret had excited amongst the people. The War of the Roses was not simply a dynastic contest. It arose from various causes, ecclesiastical, social, and political. The House of York placed itself at the head of the popular party in resisting the ecclesiastical and aristocratic policy with which the House

House of York.

and in default, on the other sons of the king in order," this inaccuracy leads to a legal absurdity.

(*i*) Rot. Parl., iii. 575, 576.

(*k*) In the repealing statute (7 & 8 Hen. IV.) the reason for the change as alleged in the recited petition of the Lords and Commons is given. Rot. Parl., iii. 581.

(*l*) 7 Hen. IV. c. 2, in Statutes Revised, i. 278. Its proper date is 8 Hen. IV., as given in Rymer, viii. 462, and in the exemplification in Rot. Parl. iii. 581.

(*m*) "The Crown having been entailed by Act of Parliament (7 Hen. IV. c. 2) on Henry IV. and his issue, the House of York saw itself totally excluded, unless its pretensions could be supported by a title *paramount to the power of Parliament*. Proximity in blood was its only refuge, and to that the partsans of that house resorted."—Sir Michael Foster, Crown Law, p. 403.

of Lancaster had ultimately become identified, and by so doing gained a degree of power and influence which no mere genealogical claim would have afforded it. The right of parliament to decide the question of succession was tacitly admitted by Richard Duke of York himself, when, in 1460, he personally urged his claim before that assembly, and accepted a compromise confirming the crown to Henry VI. for life, and acknowledging Duke Richard as heir-apparent in place of Henry's son (*n*). From the day of the battle of Wakefield (Dec. 23, 1460), when Richard of York was slain, King Henry was regarded by the adherents of the White Rose as having forfeited the crown through his breach of the parliamentary compromise. He was deposed by an assembly of Yorkist prelates and barons at London, on March 3, 1461; and Edward, son of the late Duke of York, was elected king, as well by the select assembly as by a popular vote of soldiers and citizens assembled in St. John's fields, Clerkenwell. On the 4th he went in procession to Westminster and was proclaimed king as Edward IV. (*o*). The crown was in reality seized by Edward *flagrante bello*, and it was not until after his victory at Towton on March 29, which put an end to all competition, that he can be said to have obtained actual possession of the sovereignty. His first parliament, however (whose meeting was delayed by the troubled state of the kingdom till November 4), adopting the Yorkist theory of indefeasible hereditary right, found no difficulty in fixing the commencement of his reign at March 4, and in declaring the sovereigns of the House of Lancaster to have been usurpers and "pretensed kings" (*p*).

Deposition of Henry VI. and election of Edward IV.

During the brief Lancastrian restoration (October 1470—April 1471) the crown was re-settled by Parliament on Henry VI. and his issue male, with remainder in default

(*n*) Rot. Parl., v. 375. Among the objections drawn up and formally propounded by the Lords in answer to the Duke of York's claim was the assertion that the statutes settling the crown on the House of Lancaster were of so high authority "as to defeat any manner of title made to any person."—*Ibid.* p. 376.

(*o*) "By the advice of the Lords Spiritual and Temporal, and by the election of the Commons." Gregory, Chron., p. 215. For a description of this coronation ceremony see Hall, Chron., p. 253.

(*p*) 1 Edw. IV. c. 1.

of such issue, to George, Duke of Clarence, brother of Edward IV., and his heirs (*q*).

Richard III. 1483.

Whatever may be thought of the claim of Richard III. (*r*), it appears certain that his accession was in accordance with the wishes of the main body of the nation, and, like Edward IV., he was acknowledged by a show of popular election (*s*). The "many and divers lords spiritual and temporal and other nobles and notable persons of the commons, in great multitude," who, on June 25, 1483, presented a roll of parchment to Richard inviting him to accept the crown, professed to act "on the behalf and in the name of the three estates of this realm of England," and declared that they had "chosen him into their king and soveraigne lord, to whom they knew for certain it appertained of inheritance so to be chosen." The dangers of a long minority, and a widespread jealousy of the Woodville family, would seem to have caused the claims of the uncle to prevail, for the last time in English history, over those of a boy nephew. His first and only parliament, after reciting that neither the said three estates, nor the persons acting in their name, had been "assembled in form of parliament," and "how that the court of parliament is of such authority and the people of this land of such

(*q*) "That if the said Henry, and Edward his first begoton son, died without Issue Male of theire Body, that the said Duke and his Heires, should be Kynge of this Lande." Rot. Parl., vi. 194. This Act is known only by the reference to it in the statute (17 Edw. IV., 1468), by which it was repealed. The petition of the Commons on which the repealing statute is founded is curious, and well brings out the Yorkist theory: "That where in your moost dolorous absence oute of this your Reame, in the parties of Holond beyng, and afore your moost victorious regresse into this same your Reame, in a pretensed Parlement, unlawfully and by usurped auctoritie summoned and called by your Rebell and Ennemye Henry the VIth, late in dede and not in right Kyng of Englond, holden here at your Paloys of Westm', the xxvi day of Novembr', the ixth yere of your moost noble reigne, under the colored title of the said Henry from the begynnyng of this pretensed reigne, and of the readeption of his usurped power, and estate the first, dyvers and many maters were treated, commoned and opened, to the anyntifying and disheritaunce of You, Soveraigne Lord, and of your Roiall bloode," &c. [Rot. Parl., vi. 191.]

(*r*) Richard III. founded his claim on (1) an alleged pre-contract of marriage of Edward IV., which rendered his issue by "dame Elizabeth Gray" illegitimate; (2) the attainder of the Duke of Clarence, by which his children were debarred from the succession; and (3) the misgovernment of Edward IV.—Rot. Parl., vi. 240, 241.

(*s*) Hall, Chron., 372.

nature and disposition, as experience teacheth that manifestation and declaration of any truth or right made by the three estates of this realm assembled in parliament, and by authority of the same, maketh before all other things most faith and certainty," proceeded to declare Richard "very and undoubted king of this realm of England, as well by right of consanguinity and inheritance as by lawful election, consecration and coronation" (*t*); and entailed the crown on the heirs of his body, particularly his son Edward, Prince of Wales, who was thereby declared heir-apparent (*u*).

The crown entailed by parliament on the issue of Rich. III.

Henry Tudor, who in default of a legitimate heir of the House of Lancaster, was recognised, without any legal hereditary claim, as the head of the Lancastrian party, obtained the crown partly by the victory at Bosworth (August 22, 1485), but mainly by the general acquiescence of the nation. His best and only legal title was the Act of Parliament by which it was "ordained and enacted by the assent of the lords and at the request of the commons that the inheritance of the crowns of England and France, and all dominions appertaining to them, should remain in Henry VII. and the heirs of his body for ever, and in none other" (*w*). "Words," remarks Hallam, "studiously ambiguous, which, while they avoid the assertion of an hereditary right that the public voice repelled, were meant to create a parliamentary title, before which the pretensions of lineal descent were to give way" (*x*). Henry VII. was, in fact, made by parliament the stock of a new dynasty (*y*), to the exclusion of the whole house of York; but the hereditary claims of that house were happily merged in the parliamentary title of the Tudors by the subsequent marriage of the king with the daughter of Edward IV.

Henry VII. 1485.

The crown is entailed by parliament on him and his issue.

(*t*) Rot. Parl., vi. 240, 241.
(*u*) Rot. Parl., vi. 240-242.
(*w*) 1 Hen. VII., c. 1.
(*x*) Const. Hist., i. 8.
(*y*) The words of the Act settling the crown upon Henry VII. have been substantially carried out, every subsequent sovereign of England having been a descendant—although not, since the Revolution, "heir"—of his body.

Parliamentary settlements of the succession in the reign of Henry VIII.

In the reign of Henry VIII. the succession to the crown was repeatedly altered by legislative enactment.

(1) By the Royal Succession Act of 25 Henry VIII. c. 22, passed on the occasion of the king's marriage with Anne Boleyn, the crown was entailed on the king's issue male, "and for Default of such sons of your Body begotten, . . . that then the said Imperial Crown . . . shall be to the Issue Female between your Majesty and your . . . most dear and most entirely beloved Wife Queen *Anne* begotten, that is to say, first, to the eldest issue Female, which is the Lady *Elizabeth*, now Princess . . . and so from Issue Female to Issue Female, and to the Heirs of their Bodies, one after another, by Course of Inheritance, according to their Ages, as the Crown of England hath been accustomed and ought to go, in Cases where there be Heirs Females to the same."

(2) Subsequently to the king's marriage with Lady Jane Seymour, parliament, in the plenitude of its sovereign authority, passed an Act (*z*) by which (after declaring the king's marriage with Queen Katherine void, and his marriage with Anne Boleyn likewise void, and the issue of both marriages illegitimate) the crown was entailed on the sons of the king and Queen Jane successively and the heirs of their bodies, with remainder to the king's sons by any future wife in like manner, and on failure of such issue, to the daughters of the king and queen successively and their issue. And after reciting that if the king should die without lawful issue, no provision having been made in his lifetime touching the succession, the realm in that case would be destitute of a lawful governor, "or else percase encumbered with such a person that would covet to aspire to the same, whom the subjects of this realm shall not find in their hearts to love, dread, and obediently serve as their sovereign lord" (*a*), the Act proceeds to bestow upon the

(*z*) 28 Hen. VIII. c. 7.

(*a*) "This seemeth to be pointed at James V. of Scotland, who was at this time the next in succession upon the failure of the king's issue; not barely as being descended from the union of the two Roses, but under the parliamentary entail in favour of Henry VII. and the heirs of his body made before that union took place. . . . Notwithstanding the near relation the house of Stuart stood in to the Crown of England, Scotland was, during all King Henry's reign, the same detested enemy it had been for ages past:

king the extraordinary power, in default of lawful issue of his body, to limit the crown, by letters patent, or by his last will made in writing and signed with his hand, to such person or persons in possession or remainder, and after such order or condition, as he should judge expedient. Not even a preference for persons of royal descent was reserved, but it was declared that the persons so to be appointed should enjoy the crown "as if they had been lawful heirs to the same, or as if the crown had been given and limited to them plainly and particularly by special names and sufficient terms, by full and immediate authority of the High Court of Parliament" (*b*).

(3) By a later Act (*c*), after reciting the previous statute, Henry's two daughters, Mary and Elizabeth, were put into the entail next after the lawful issue male or *female* of the king and Prince Edward, but subject to such conditions as the king should, by letters patent or his last will, appoint. In the event of their failing to perform the conditions, or dying without issue, the king was again empowered to limit the succession as by the last Act.

The second Succession Act had declared Mary and Elizabeth to be illegitimate. The third, upon a supposition of their illegitimacy, now postponed them even to all the lawful issue *female* of the king; but yet in default of lawful issue of the king and Prince Edward, it limited the crown to the illegitimate daughters of the king and their issue in preference to all the other descendants of Henry VII. (*d*).

and a national prejudice operated in both kingdoms as strongly as ever."—Foster, Crown Law, 406.

(*b*) These alternatives, "as if they had been lawful heirs," or "as if the Crown had been given by Parliament," indicate the two principles upon which the succession has rested since the Crown ceased to be purely elective. Foster (Cr. Law, 408) enunciates them thus: "That, no Act of the Legislature intervening, the Crown and royal dignity ought to descend from ancestor to heir in a certain established course of descent, but that this course of descent is subject to the controul of the Legislature." When the deposition of a reigning sovereign is necessary—as in James II.'s case—the "legislature" must be taken as synonymous with the "estates of the realm."

(*c*) 35 Hen. VIII. c. 1, strongly enforced by 1 Edw. VI. c. 12.

(*d*) The legitimacy of each of the daughters of Henry VIII. was liable to dispute, and it is impossible, on any theory, to support the legitimacy of both. Their illegitimacy was, however, taken out of the ordinary category

Henry VIII. devises the crown.

In exercise of the power given to him by these Acts of Parliament (*e*), Henry VIII. devised the crown, in remainder, on failure of issue of his three children, to the heirs of the body of his younger sister, Mary, Duchess of Suffolk, thus postponing the descendants of his elder sister, Margaret, Queen of Scots (*f*).

Act passed on the accession of Queen Mary.

Edward VI., Mary, and Elizabeth, succeeded each other on the throne in strict accordance with, and by virtue of, the parliamentary entail. On the accession of Queen Mary an Act was passed (1 Mary, sess. 2, c. 1) repealing, as far as concerned herself, all the Acts which stood in the way of her legitimacy, and declaring the marriage of her father and mother valid, the sentence of divorce a nullity, and that she was the legitimate issue of the king.

Queen Elizabeth's title.

On the first notice of Mary's death, Elizabeth was proclaimed, by order of the House of Lords then sitting, true and lawful heir to the crown *according to the act of succession of the 35th year of Henry VIII.* (*g*). Whatever other title the queen might be presumed to have, her parliamentary title was clearly the one on which she relied. Discarding the precedent set by her sister, she suffered all altercation about the marriage of her father and mother, and the subsequent divorce, to sink into oblivion. The Act passed on her accession, though vaguely asserting in general terms her descent from the blood royal and that she was as fully entitled as her father or brother had been (which was perfectly true, since each reigned by a good parliamentary title), declared in guarded and limited terms that she was as fully entitled as her sister was

Act passed on her accession.

by the fact that the mother of each was acknowledged as a lawful wife at the time of the daughter's birth.

(*e*) "The full and immediate authority of the legislature in the matter of the succession must have been presupposed as a matter past all dispute; otherwise a delegation of that authority would have been no better than an idle, vain, and ineffectual parade, an insult upon common sense and an affront to the king himself."—Foster, Crown Law, 410.

(*f*) On the validity of the execution of Henry VIII.'s will, see Hallam, Const. Hist., i. 34, 289, 294; Lingard, Hist. Eng., vi. 213; Bailey, Succession to Eng. Crown, 156-164.

(*g*) Foster, Crown Law, 409.

at any time *since the statute of the 35th year of King Henry VIII.* (*h*).

Treason to deny the power of parliament to limit the succession.

So completely established, in the time of Elizabeth, was the power of parliament to alter the line of succession, that it was expressly enacted by statute that if any person should affirm or maintain that the laws and statutes did not bind the right of the crown and the descent, limitation, inheritance, and governance thereof, his offence should be high treason. To affirm, by any book or work written or printed (before the same should be established by parliament), that any one particular person was or ought to be heir and successor to the queen, involved imprisonment, and for the second offence, a *præmunire* (*i*).

James I. 1603.

On the death of Elizabeth, the Council of the late queen proclaimed as her successor, James, King of Scots, the heir of Margaret, elder sister of Henry VIII. As the claim of the House of Suffolk under the will of Henry VIII., and the Acts of Parliament authorising him to dispose of the crown, was legally indisputable, the first king of the House of Stuart was in the eye of the law a usurper. But the proclamation of the Council, which in itself could give no right, was voluntarily ratified by the popular

(*h*) 1 Eliz. c. 3. "This declaration so guarded and limited seemeth strongly to imply, either that in the judgment of Parliament Queen Mary had no title antecedently to that Act (35 Hen. VIII.), or that Elizabeth, having no other, it was thought but decent to put the sisters upon an equal footing, as former Parliaments had done."—Foster, Crown Law, 412.

(*i*) 13 Eliz. c. 1. The penalty for every person so affirming or maintaining *after the decease of the Queen*, was forfeiture of goods and chattels only. This clause as to the power of parliament in the matter of the succession was, in substance and with almost identical words, revived and re-enacted by the 4th of Anne, c. 8, and the 6th of Anne, c. 7. Another section of the Act of Elizabeth enacted that whoever during the life of the queen should by writing or printing declare *before the same be so established and affirmed by Act of Parliament* that any person in particular except the issue of her Majesty, was or ought to be right heir or successor to the queen, should for the first offence suffer imprisonment for a year and forfeit half his goods, and for the second incur the penalties of præmunire. Neither the claims of the House of Suffolk nor of the House of Stuart were affected by this section. It merely shows, remarks Foster, "that the eventual right of any individual, though grounded on common or statute law, was judged a question too big for ordinary discussion, and proper only for the discussion of the legislature."

voice (*k*); and after the ceremony of his coronation had been performed, an Act of his first parliament (*l*) made him, what he had not up to that time been, a legitimate sovereign.

Doctrine of indefeasible hereditary right.

James I. was the twenty-third occupant of the English throne since the death of William the Conqueror. Of that number, twelve had succeeded to the throne not being legal heirs of the Conqueror, according to the doctrine of primogenitary succession, and three more, although legal primogenitary heirs, had not succeeded in the regular course of descent (*m*). Edward II. and Richard II. had been solemnly deposed by parliament, and on the latter occasion the throne itself was declared to be vacant (*n*). The line of succession had on several occasions been altered, as we have seen, by the authority of parliament. Yet in the teeth of these facts, the lawyers and divines of the Stuart period laboured to establish the doctrine of an indefeasible hereditary right to the crown. But even the ultra-royalist and reactionary House of Commons under Charles II. attempted to assert the right of parliament to alter the succession by twice passing, in 1679 and 1680, the bill for the exclusion of the Duke of York from the throne.

Revolution of 1688.

At length in 1688 all doubts as to the power of parliament to regulate the succession as it should think fit, were finally set at rest by the "glorious revolution" which overturned

(*k*) "What renders it absurd to call him [James] and his children usurpers? He had that which the flatterers of his family most affected to disdain—the will of the people; not certainly expressed in regular suffrage or declared election, but unanimously and voluntarily ratifying that which in itself could surely give no right, the determination of the late queen's Council to proclaim his accession to the throne."—Hallam, Const. Hist., i. [289].

(*l*) 1 Jac. I. c. 1.

(*m*) The twelve not primogenitary heirs of the Conqueror were: William II., Henry I., Stephen, John, Henry III., Henry IV., Henry V., Henry VI., Richard III., Henry VII., Mary, Elizabeth. The three who although primogenitary heirs did not succeed in the regular course of descent were: Henry II., Edward III., Edward IV. To these latter we ought to add James himself; for since Mary and Elizabeth had both been declared illegitimate by Act of Parliament, and since in any case one of them must have been so, the hereditary right of James, as well as that of his mother Mary Queen of Scots, had, in the view of the upholders of indefeasible primogenitary succession, been postponed to a mere parliamentary title.

(*n*) Walsingham, ii. 237.

the Stuart dynasty, and once more set an elective king upon the throne. Both Houses of the Convention Parliament concurred in a resolution "That King James II. having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people (*o*), and having by the advice of jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the kingdom, has *abdicated* the government, and that the throne is thereby *vacant*" (*p*). In the Declaration of Rights, the final resolution to which both Houses came on February 13, it was determined "That William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and dignity of the said kingdoms and dominions to them the said Prince and Princess, during their lives and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess during their joint lives; and after their decease the said crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; for default of such issue, to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, the heirs of the body of the said Prince of Orange" (*q*).

Deposition of James II.

Election of William of Orange.

(*o*) The "original contract" between king and people which is here solemnly asserted is as utterly devoid of historic foundation as the opposite principle of "divine right," but, in the words of Whewell, "it may be a convenient form for the expression of moral truths."—See Maine, Ancient Law (ed. Pollock, 1906), p. 357.

(*p*) Commons' Journals; Parl. Hist.

(*q*) This declaration was afterwards embodied and confirmed in the Bill of Rights (1 Will. and Mary, sess. 2, c. 2) with the further important restriction that all persons who shall profess the popish religion or marry a papist shall be excluded and for ever incapable to inherit, possess, or enjoy the crown and government of this realm; and in all such cases the people shall be absolved from their allegiance, and the crown shall descend to the next protestant heir. (*Infra*, ch. xv.) Hallam (Const. Hist., ii. [98]) thus sums up the changes effected by the Convention Parliament: It "pronounced, under the slight disguise of a word unusual in the language of English law, that the actual sovereign had forfeited his right to the nation's allegiance. It swept away by the same vote the reversion of his posterity and of those who could claim the inheritance of the Crown. It declared

Act of Settlement.

Queen Mary died in 1694 without issue, and William, in accordance with the Act for settling the succession to the crown, became sole ruler. On the death, in 1700, of the young Duke of Gloucester, son of the Princess Anne of Denmark, the manifest probability that the entail established would come to an end at the decease of the king and the Princess Anne, rendered it again necessary that parliament should exercise its power of settling the succession. Its freedom of choice was unlimited. The resolution of the Convention Parliament which declared the throne of James II. to be "vacant," abrogated by implication the hereditary right to the succession previously existing in the descendants of Henry VII. But the wisdom was obvious of deviating no farther than the welfare of the nation absolutely demanded from the old hereditary line. Passing over therefore the children of James II., the Duchess of Savoy, daughter of Henrietta, Duchess of Orleans, and the elder children of Elizabeth, wife of the Elector Palatine, parliament selected the Electress Sophia of Hanover, the nearest heir who professed the protestant faith, as the root of a new royal line. By an Act of Settlement (*r*), all prior claims of inheritance, save the existing entail in favour of the issue of the Princess Anne and of King William being set aside and annulled, the crown was settled on the "Princess Sophia, Electress and Duchess Dowager of Hanover, daughter of the most excellent Princess Elizabeth, late Queen of Bohemia, daughter of our late sovereign lord King James the First of happy memory," and "the heirs of her body being Protestants" (*s*).

Recapitulation.

Taking a brief retrospect of the ground travelled over in

that, during an interval of nearly two months, there was no King of England; the monarchy lying, as it were, in abeyance from the 23rd of December to the 13th of February. It bestowed the Crown on William, jointly with his wife indeed, but so that her participation in the sovereignty should be only in name. It postponed the succession of the Princess Anne during his life. Lastly, it made no provision for any future devolution of the Crown in failure of issue from those to whom it was thus limited, leaving that to the wisdom of future Parliaments."

(*r*) 12 & 13 Will. III. c. 2; *infra*, ch. xvi.

(*s*) A provision settling the reversion to the crown on the Electress Sophia had been inserted, by the House of Lords, in the Bill of Rights, but the commons rejected it without a division. Parl. Hist., v. 339.

this chapter, and summing up the results of the detailed investigation in which we have been engaged, the facts as to the succession to the crown may be broadly stated as follows:—

In its origin the kingship of the English was distinctly elective, but with a restriction of choice, in all ordinary cases, to the members of one royal house. At the Norman conquest a new royal stock was substituted for the ancient line of Cerdic, but the elective character of the kingship continued unaltered. In form the election was, indeed, presently modified by the prevailing feudalism, and the vote of the witenagemot was then represented by the proffered homage and fealty of the magnates of the realm. But in addition to election, the ecclesiastical ceremony of coronation was throughout essential to the acquisition of the regal status, and in the coronation service the form of election was again gone through, nominally, this time, by the whole people. The accession of Edward I. marks the earliest important innovation. He was the first king who reigned before his coronation. The doctrine of hereditary right, which gradually arose as the personal idea of kingship was superseded by the territorial idea, had now largely obscured the elective character of the kingship, and its true nature as an office or trust as distinguished from a mere descendible property. But this obscuration was never total. The hereditary right of the heir was not a right to succeed as to an estate, but a right to be elected king. Its nature was well expressed by the representatives of the three estates when they declared to Richard III. in 1483 that they had "chosen him into their king to whom they knew it appertained of inheritance so to be chosen." The difference, though apparently a slight one in its practical effect, in reality is of considerable importance as marking the persistence of the elective and fiduciary character of the kingship.

Edward I. had been recognised as king four days after the death of his father. The accession of Edward II. on the day following his father's decease marks a further advance in the hereditary doctrine; an advance, however, which was more than neutralised by the revival, against

his person, of the right of the National Assembly to depose the king. By the unopposed succession of Richard II. to the exclusion of his uncles, the right of representative primogeniture was for the first time asserted in the devolution of the crown. But as in the case of Edward II., so in the case of Richard, no sooner had the doctrine of strict hereditary descent progressed another step, than it was met by the reassertion of the right of parliament to depose the sovereign, and by the negation of any indefeasible right of primogeniture, through the election of Henry of Lancaster.

It was by the House of York, who were themselves the real "usurpers" of the throne, that the doctrine of indefeasible hereditary right was first propounded in its full force and significance. The crown seems to have been by them actually regarded as a private estate for their own personal benefit. Yet even Edward IV. sought and obtained a parliamentary confirmation of his title: and when, a quarter of a century later, the crown was settled on Henry VII. and his issue, to the exclusion of the whole House of York, the kingship was replaced on its elective basis.

The elective right of parliament, however, was now exercised not periodically on the death of each sovereign—hereditary succession having been the normal rule from the accession of Edward II. at the latest—but whenever it became necessary to elect a new royal stock, as in the case of Henry IV. and of Henry VII. By the marriage of Henry VII. with Elizabeth of York, what may be termed the "legitimate" claims of that house were transmitted to all her descendants; yet the right of parliament to alter the succession was never more signally asserted than in the Act which conferred upon King Henry VIII. unlimited power to nominate his successor. James I., coming to the throne without a legal title, attempted to revive the Yorkist theory of hereditary right. In the recitals of the Act of Parliament by which the crown was settled upon him, care was taken to carry back his pedigree to Elizabeth, daughter of Edward IV., and to omit all mention of the entail upon Henry VII. and his issue. But the theory of indefeasible hereditary right, fortified as it was by the Stuart addition of a sanction

jure divino, utterly failed to take permanent root, and was finally extirpated by the Revolution of 1688 and the subsequent Act of Settlement, which entailed the crown on the descendants of Sophia of Hanover. In that statute, parliament, for the last time in our history, exercised its paramount right to settle the succession to the crown; a right founded not only in reason, but in the ancient principles of our constitution, and supported by long usage and a uniformity of theory and practice for centuries prior to the Revolution (*t*).

(*t*) ["For these deviations from the legitimate succession in the male line in favour of daughters, legal construction was obliged to resort to legal fictions and to a deduction *ex necessitate rei* to reduce the breach that had been made in the fixed rules of hereditary descent to its lowest possible significance, and, so far as human prudence and wisdom could effect this, to avoid dangerous precedents for the future. Blackstone builds up from this process his four positions concerning the royal title: (1) that the Crown is hereditary; (2) hereditary in its own manner (analogous to the descent in real estate); (3) that the right of succession may be from time to time altered or limited by resolution of Parliament; with which restrictions, (4) the Crown always will be hereditary, is so and remains so."—Gneist, Hist. Engl. Const., p. 629, note.—ED.]

CHAPTER VII.

ORIGIN OF PARLIAMENT.

Commune Concilium Regni.

England has never been without a National Assembly, a *Commune Concilium Regni*, by whose "counsel and consent" the work of government has been carried on. But, whilst retaining its corporate identity, the name, powers, and constitution of this assembly have varied from time to time. The nature and functions of the old English witenagemot have been already sufficiently described (*u*). After the Norman conquest the witan still continued to be summoned, as before, to give counsel and consent on the promulgation of a new law, or the imposition of a new tax; but owing alike to the infrequency of legislation under the Norman kings, and to the predominance of the royal power, the legislative functions of the assembly must have been formal rather than real. As the feudal principle gradually acquired predominating influence in every department of the state, the Meeting of the Wise almost insensibly changed into the *Curia Regis*, the court of the king's feudal vassals. All immediate tenants of the crown by military service, however small might be their holdings, had originally a personal right to be summoned to the Common Council of the realm whenever the king wished to impose any extraordinary aid, and probably on other occasions also. The bishops and principal abbots continued to be summoned without any intermission, though their ancient character of witan appears to have become gradually merged in that of feudal barons. The earls also, who were "at all times and without exception indisputably noble" (*w*), never lost their right to attend. But as regards all other military tenants *in capite*, although con-

Witenagemot.

Curia Regis.

(*u*) *Supra*, pp. 29-33.
(*w*) Hallam, Midd. Ages, iii. 235.

stitutionally members of the *Commune Concilium*, it is highly probable that the king early assumed the power of selecting the persons to whom writs of summons should be addressed (*x*). Thus the same indefiniteness and uncertainty which had characterised the constitution of the witenagemots continued as a feature of the feudal Great Councils.

With the exception of the famous gemot of Salisbury in 1086, which was attended not only by the witan but by all the landowners of the kingdom (*y*), whether tenants-in-chief or not, and the similar general muster of landowners held by Henry I. at Salisbury in 1116 (*z*), the complete assembly of all the tenants-in-chief can hardly ever have taken place (*a*). Still, the personal right always subsisted; and it was the infringement of this right, when councils were summoned for the purpose of granting extraordinary aids, which led to the provision in John's Magna Carta by which the king promised on such occasions to summon all tenants *in capite*, the archbishops, bishops, abbots, earls, and *majores barones* individually, and the rest generally through the sheriff. This difference in the mode of summons—a difference which had been observed for at least half a century (*b*) and probably from a still earlier period —is evidence of the inequality then existing among the tenants-in-chief. Though formally recognised by Magna Carta, the right of the inferior tenants-in-chief to attend the National Council must soon have become impracticable through the increase in their numbers (arising from the subdivision of tenures), their comparative poverty, and the

(*x*) Report of Lords' Committee on Dignity of a Peer, 1819.

(*y*) See *supra*, p. 53.

(*z*) Flor. Wigorn., *s. a.* 1116.

(*a*) "Henry II. made the national council a different thing from what Henry I. had left it. . . . Its composition was a perfect feudal court: archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders. . . . That towards the end of his reign he found it necessary to limit the number of lower freeholders who attended the councils is very probable; the use of summonses, which prevailed from the first year of the reign, gave him the power of doing this."—Stubbs, Select Chart., Introduction, 22.

(*b*) In 1164, Archbishop Becket felt himself insulted by receiving a summons to the Great Council in Northampton, not by special writ, but through a common summons directed to the Sheriff of Kent. Will. Fitz-Stephen [Rolls ed. iii. 51].

The *majores barones*.

Hereditary character of the House of Lords.

personal inconvenience of attending at long distances from home. Thus the ancient National Assembly gradually ceased to be anything more than an assembly of the "greater barons," and ultimately developed into a hereditary House of Lords, the Upper House of the national parliament (*c*). The hereditary character of the House of Lords—now long regarded as fixed and fundamental—accrued slowly and designedly, as a consequence of the hereditary descent of the baronial fiefs, practically inalienable, in right of which summonses to the National Council were issued. But, in addition to the barons by tenure, the king had always the right, and, at least as early as the reign of Edward I. had acquired the habit, of summoning other persons who held nothing of the crown by barony. It is certain that a summons was not at first regarded as conferring even a lasting personal right, much less one that was hereditary (*d*); but by the time that the custom arose of creating baronies by letters patent (the first instance of which [in England] was the creation of Sir John Beauchamp of Holt as Lord Beauchamp of Kidderminster, in the 10th of Richard II.), the hereditary nature of the

(*c*) The Lords' Committee (p. 314), speaking of the 15th of Edward III., say: "Those who may have been deemed to have been in the reign of John distinguished as *majores barones*, by the honour of a personal writ of summons, or by the extent and influence of their property, from the other tenants-in-chief of the Crown, were now clearly become, with the earls and the newly created dignity of duke, a distinct body of men denominated peers of the land, and having distinct personal rights; while the other tenants-in-chief, whatsoever their rights may have been in the reign of John, sunk into the general mass."

(*d*) Freeman, Growth of Eng. Const., 61; Hallam [Mid. Ages, iii. 125], quoting Prynne's 1st Register, p. 232, says: "No less than 98 laymen were summoned once only to Parliament, none of their names occurring afterwards; and 50 others, two, three, or four times. Some were constantly summoned during their lives, none of whose posterity ever attained that honour." For the obscure history of the early baronage, see generally Hallam, iii. 121, 234. Stubbs has briefly summed up the successive changes in the constitution of the baronage, the chronology of which is far from easy to fix. Originally including all *barones*—that is, all homagers holding directly of the crown—the baronage was limited: (1) to all who possessed a united "corpus" or collection of knights' fees held under one title; (2) to those who, possessing such a barony, were summoned by special writ; (3) to those who, whether entitled by such tenure or not, had received a special summons; (4) and finally to those who had become by creation or prescription entitled hereditarily to receive such a summons.—Select Chart., Introductory Sketch, 37.

baronage, irrespective of tenure, may be regarded as the established rule (*e*). Still, the rule has never been without exception. The presence of the bishops in the House of Lords is at once an exception to the principle of hereditary right, and a continuing witness of the times when such right had no existence. Down to the suppression of the monasteries by Henry VIII., in 1539, while the abbots and priors sat with the bishops, the spiritual life-peers actually outnumbered the lords temporal; and even after the abbots and priors had been removed, the bishops alone formed about one-third of the House of Lords (*f*). Independently, however, of the spiritual peers, several cases of the creation of lay peerages—dukedoms and earldoms—for life only (*g*) occurred between the reigns of Richard II. and Henry VI.; but from the latter date, for more than four hundred years, no instance is recorded of any man being admitted to a seat in the House of Lords as a peer for life.

Spiritual peers.

Lay peerages for life.

In 1856, with the object of improving the ancient appellate jurisdiction of the Upper House, an attempt was made to re-introduce life-peerages by means of the royal prerogative. This was defeated, however, by the successful resistance of the House of Lords. Sir James Parke, late one of the barons of the Court of Exchequer, having been created Baron Wensleydale "for and during the time of his natural life," the Lords referred the patent to a committee of privileges, and agreed, in accordance with its report, "that neither the letters patent, nor the letters patent with the usual writ of summons in pursuance thereof, can entitle the grantee to sit and vote in parliament." In consequence of this

(*e*) Lord Redesdale, in the L'Isle peerage case, gave his opinion that from the 5th year of Richard II. a writ of summons, with a sufficient *proof of having sat* by virtue of it in the House of Lords, created a hereditary peerage.—Nicolas, Case of the Barony of L'Isle, p. 200. [See Pike, Const. Hist. of House of Lords, pp. 99 *seq.*; and Gneist, Adel und Ritterschaft in England (Berlin, 1853).—Ed.]

(*f*) May, Constitutional History, i. 299. By the profuse creation of peers in recent times, the relative proportion of the bishops in the House of Lords has been reduced from one-third to less than one-fifteenth.

(*g*) The cases are collected in the Report of the Committee of Privileges, 1856.

decision a new patent was issued creating Lord Wensleydale a hereditary peer of the realm. The resolution of the Lords, remarks Sir Erskine May, "has since been generally accepted as a sound exposition of constitutional law. Where institutions are founded upon ancient usage, it is a safe and wholesome doctrine that they shall not be changed, *unless by the supreme legislative authority of parliament*" (*h*). After an interval of twenty years, during which the appellate jurisdiction was at one time actually abolished prospectively as to England, two lords of appeal in ordinary were constituted by Act of Parliament, with the rank of baron for life and the right of sitting and voting during their tenure of office only.

Life peers.

[The life-peerages created by the Appellate Jurisdiction Act, 39 & 40 Vict. cap. 59, form, having regard to their mode of creation, such an important innovation from the standpoint of constitutional history as to deserve more than a passing notice. By the Act before mentioned, power was given to appoint a third lord of appeal in ordinary upon the demise or retirement of two paid judges of the Judicial Committee of the Privy Council, and a fourth when the two remaining paid judges retired or resigned. "An old principle was recognised and a new principle introduced. The principle that the holder of a barony for life (as in the case of Lord Hay) enjoyed the rank of baron, and not the right of sitting and voting in parliament, was, as it were, reasserted. The introduction of lords with a right to be summoned, and to sit, and vote, not even for life, but only during the tenure of office, was quite new as applied to laymen, or was, at any rate, without precedent since the days of earlier chancellors" (*i*). The innovation thus made was still further extended by the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. cap. 70), which enables these life-peers to sit and vote as members of the House of Lords, even after retirement from office; and the vital clause (2) runs: "The sixth section of the Appellate Jurisdiction Act, 1876, shall be construed and take effect, as well in respect of any Lord of Appeal in Ordinary heretofore appointed under that Act, as of any such lord hereafter

(*h*) Const. Hist., i. 298. (*i*) Pike, Const. Hist. House of Lords, p. 383.

appointed, so as to entitle any person so appointed to sit and vote as a member of the House of Lords during his life as fully as if the words 'during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer,' had been omitted from the said section." The lords of appeal became now lords of parliament for life, with no descendible dignity attached. By order of Queen Victoria, on the occasion of her Diamond Jubilee in 1897, precedence was given to the children of lords of appeal in ordinary, immediately after the younger children of hereditary barons, though the warrant was not gazetted till August 1898. The question has often been asked whether such a lord would for a criminal offence be triable by his peers. There seems to be no doubt that, not being ennobled in blood, he would not be triable, any more than are such bishops as, during the tenure of their episcopate, have a seat in the House (*k*). By the Judicature Act, 1891, sec. 3, assessors were appointed to assist in the hearing of appeals before the House of Lords (*l*).]

Ideas of election and representation familiar to the nation.

As the ordinary tenant-in-chief became gradually merged in the general mass of freeholders, his theoretical right of attending the Commune Concilium in person was exchanged for the practical right of electing representatives, who in his name consented to the imposition of taxes. The ideas of election and representation, both separately and in combination, had been familiar to the nation, in its legal and fiscal system, long before they were applied to the constitution of the national parliament. The English kingship was always in theory, and to a great extent in practice, elective. The bishops and abbots were supposed to be elected by the clergy, of whom they were the representatives. In the local courts of the hundred and the shire the reeve and four men attended as representatives from each township and the twelve assessors of the sheriff represented the judicial opinion of the whole shire. Subsequently, in the system of recognition by jury, as established by Henry II., the principles of election and

(*k*) For a further discussion on the various points, *cf. infra*, cap. xvii., sub. House of Lords; and Pike, Const. Hist. House of Lords, pp. 383 *seq.*

(*l*) [See also Maitland, Const. Hist., pp. 168-170.—Ed.]

representation were successively applied to almost every description of business—fiscal, judicial, and administrative. In the four sworn knights summoned by the sheriff to nominate the recognitors of the Grand Assize we have, probably, the first germ of a county representation (*m*).

National Council, St. Albans, 1213.

The first historical instance of the extension to a National Council of the representative machinery which had long existed in the folkmoot of the shire is afforded by the council held at St. Albans on August 4, 1213, after John's submission to the pope, and during his dispute with the northern barons on the question of foreign service (*n*). This assembly was attended not only by the bishops and barons, but also by the representative reeve and four men from each township on the royal demesne. The immediate business to be transacted was the assessment of the amount due by way of restitution to the church; but several other matters of national importance appear to have been discussed by the assembly. The justiciar, Geoffrey FitzPeter, submitted to the whole body the recent promise of good government made to Archbishop Langton by the king on receiving absolution at Winchester, about a fortnight previously; referred them to the laws of Henry I. as the standard of what that good government should be; and issued an edict commanding the sheriffs and other royal officers, on penalty of life and limb, to cease from their illegal exactions (*o*).

County representation in parliament before 1265.

Four instances of summoning representatives of the shires to the National Council are met with prior to De Montfort's celebrated parliament of 1265, which is sometimes erroneously spoken of as the "origin of popular representation" (*p*).

Four knights from each county summoned to Oxford. Nov. 7, 1213.

(1) The first occurred during the contest between John and the barons, when both sides found it necessary to seek the support of the free tenants of the counties. In 1213 (15th of John) the king, by his writ to the sheriffs,

(*m*) Stubbs, Select Chart., Introductory Sketch, 24; and see Palgrave, Eng. Commonwealth, ch. viii.

(*n*) See *supra*, p. 98.

(*o*) Matt. Paris, p. 239, *s. a.* 1213.

(*p*) *E.g.*, Hallam, Middle Ages, iii. 27.

directed four discreet knights of each shire to be sent to him at Oxford "ad loquendum nobiscum de negotiis regni nostri" (*q*). There is no indication on the face of this writ whether the four knights were to be elected by the county or returned at the discretion of the sheriff; but as there already existed a recognised machinery for the election, in the county court, of four knights, to nominate the recognitors in civil suits and the grand jury for the presentment of criminals, we may reasonably conclude that the accustomed machinery was now made use of for the novel purpose of county representation in the general assembly. It is probable also that the 14th clause of John's Charter, which promised that the minor barons should be summoned generally by the sheriff, though it undoubtedly recognised their personal right to attend, was practically interpreted by the light of the county representation system already introduced less than two years previously. If, as we cannot doubt, the county representatives were elected in the county court, it follows, since all freeholders had a right to attend this court, that the knights of the shire were held to represent not merely the minor tenants-in-chief, but all the freeholders of the shire (*r*).

Increased use of representatives for fiscal and other matters.

A long interval of forty years elapsed before the presence of representatives of the counties in parliament is again recorded. But the period is marked by the increasing use of representatives elected in the county court for fiscal and other purposes. Thus, in 1220 and 1225, two writs of Henry III. direct the election of knights for the assessment and collection of subsidies (*s*), and in 1226 writs were directed to the sheriffs of eight counties to send to the king, at Lincoln, four knights elected in each county, to make complaints against the sheriffs, concerning an alleged infringement of the Great Charter (*t*). To a general assembly of the barons at London in 1246, the

(*q*) [*Cf.* Lords' Report, App. i., p. 2.—Ed.]
(*r*) Stubbs, Select Chart., Introd. Sketch, 39, 40. See also Const. Hist., ii. 235-242.
(*s*) Close Rolls, i. 437; Rymer, i. 177.
(*t*) Report on Dignity of a Peer, App. i. 4.

Name of parliament.

name of parliament (*u*), which had previously been indiscriminately ascribed to assemblies of various kinds, is for the first time given by a contemporary chronicler, Matthew Paris (*w*). Henceforth it became specially, though not for many years exclusively, the appellation of the National Council (*x*).

Two knights from each county summoned to Westminster. 1254.

(2) The second instance of county representation in parliament is met with in 1254, when Henry III. was in Gascony, and in want of men and money. By his direction Queen Eleanor and the Earl of Cornwall, the regents, issued writs to the sheriffs to cause to come before the King's Council at Westminster two lawful and discreet knights from each county, whom the men of the county shall have chosen for this purpose in the place of all and each of them, to consider, together with the knights of the other counties, what aid they will grant the king in such an emergency. These writs possess both a positive and a negative importance. On the one hand we have it clearly directed that the two knights are to be chosen by the county—that is, in the county court; that they are to represent the whole county, and are to have a deliberate voice in the assembly; on the other, the absence of any restriction of the elective franchise to tenants *in capite*, or to knights, is sufficient evidence that no such restriction then existed (*y*).

The utter falseness of Henry III.—who persistently dis-

(*u*) [*Cf.* Gneist, Hist. Engl. Const., p. 261, and citations.—Ed.]

(*w*) p. 696.

(*x*) In a writ of the 32nd of Henry III. (1247) the expression "coram rege et toto parliamento" is used.—Rot. Claus., 32 Hen. III., m. 13, dors. Even after the National Council had permanently in 1295 assumed the form of a perfect representation of the three estates of the realm, the name of parliament continued, though improperly, to be applied both to the terminal sessions of the king's Ordinary Council, and to the occasional assemblies of the Magnum Concilium. From these councils the true National Council, the Commune Concilium Regni, is sometimes distinguished by the Chroniclers as *Generale Parliamentum*. A not infrequent term in early use for the sessions of the National Council was the Latin *colloquium*; and "it is by no means unlikely," remarks Stubbs, "that the name of Parliament, which is used as early as 1175 by Jordan Fantosme, may have been in common use. . . . When the term comes into use it is applied retrospectively; and in a record of the 28th year of Henry III. the assembly in which the Great Charter was granted is mentioned as the 'Parliamentum Runimedae.'"—Const. Hist., i. 611; ii. 235, 272. [It is also

regarded the Great Charter, notwithstanding his repeated solemn confirmations of it—his devotion to successive sets of foreign favourites, his foolish and expensive attempt to secure the crown of Sicily for his son Edmund, his illegal exactions, prodigality, and support of Rome against the national church, excited in all classes of his subjects feelings of animosity and resistance equal to, if not exceeding in intensity, those which had inspired the combination against John.

Henry III. excites the national opposition.

Matters came to a crisis in the Great Council or parliament, which met at London on April 9, 1258; and after stormy debates, lasting till May 5, the king found himself obliged to submit wholly to the guidance of the barons. At their desire he consented to the appointment of a committee of twenty-four persons, to be elected, twelve by the barons and twelve by the king, in a parliament –which the king's friends stigmatised as the "Mad Parliament" —summoned to meet at Oxford on June 11. To these twenty-four unlimited power was confided to carry out all necessary reforms. They began by drawing up the set of articles known as the Provisions of Oxford, under which all the powers of government were placed in the hands of a kind of representative oligarchy (*z*). By a rather complicated process, bearing some resemblance to the Venetian constitution, each twelve of the twenty-four selected two from the other twelve, and the four thus chosen elected fifteen as a continual Council of State. Another committee of twenty-four was appointed for the special business of treating of the aid required by the king for the war; and in order, as was alleged, to spare the other members the expense of frequent attendance in parliament (which was to meet three times a year), a third body of "twelve honest men" was elected by the barons,

The Mad Parliament.

Provisions of Oxford.

used by Wace, and is applied by Otto Morena to the diet or parliament of Roncaglia held by Frederick I. in 1154.—Ed.]

(*y*) Lords' Report on the Dignity of a Peer, i. 95, and App. i., p. 13; Select Chart., 367.

(*z*) The government in England has on four occasions been placed for a time in the hands of an oligarchy. In John's reign, the 25 barons of Magna Carta; under Henry III., the Oxford Committee of 24 (*cf.* Guizot, Hist. des Origines du Gouv. Rep., p. 167); under Edward II., the 21 Lords Ordainers; and under Richard II., the 5 Lords Appellant.

as representatives of the community, to treat with the King's Council of the common need (*a*).

Although representatives of the shires were not summoned to the Oxford Parliament, the machinery of county representation was made use of for other purposes under the Provisions, each county being directed to elect "four discreet and lawful knights" to inquire into abuses. The application, moreover, of the principles of election and representation to the constitution of the governing body of the kingdom under the Provisions, was probably not without effect in securing popular representation in parliament. In these Provisions the barons are designated as "the party of the commonalty"; and in the proclamation in English of the king's adhesion to the Provisions, he speaks of his councillors as "chosen by us and by the *landsfolk* of our kingdom" (*b*); an expression which calls to mind the "landsittende men" who attended King William's gemot at Salisbury in 1086. It would seem that at least all the landed proprietors of the realm, and not merely the barons, or even the tenants-in-chief, were regarded as represented in the governing council.

Three knights from each county summoned to St. Albans. 1261.

(3) In 1261 the king openly refused to abide by the Provisions of Oxford, and civil war broke out. During the contest, the confederate barons summoned to St. Albans three knights from each county, "secum tractaturos super communibus negotiis regni"; whereupon, the king, in opposition, issued other writs directing the sheriffs to enjoin the same knights to repair instead, on the day originally fixed, to the king at Windsor, "nobiscum super praemissis colloquium habituros" (*c*).

De Montfort's 1st parliament. June 4, 1264.

(4) The decisive victory at the battle of Lewes, on May 14, 1264, followed by the surrender of the king and his son Edward, placed the supreme power in the hands of Simon de Montfort. Although the arbitration of St. Louis of France and his award in Henry's favour (January 23, 1264) had served only to rekindle the flame of civil

(*a*) See the series of documents relating to the Provisions of Oxford in Stubbs, Select Chart., 369-396.

(*b*) Rymer, i. 378.

(*c*) Report on Dignity of a Peer, App. i. p. 23; Shirley, Royal Letters of Hen. III., ii. 179.

war, a proviso was inserted in the Mise of Lewes, referring all controversies between the king and the barons to the decision of a second arbitration. In the meantime, De Montfort, having placed friendly garrisons in all the royal castles, issued writs in the king's name, appointing certain extraordinary magistrates, called guardians of the peace, in every county and summoning four lawful and discreet knights, "per assensum ejusdem comitatus ad hoc electos pro toto comitatu illo," to attend the king in parliament at London "nobiscum tractaturi de negotiis praedictis" (*d*).

If not "the founder of representative government in England," as Guizot has termed him (*dd*), Simon de Montfort may justly be regarded as the "founder of the House of Commons" (*e*). An assembly of knights of the shire, exclusively representing the "landsfolk" of the kingdom, and closely united by descent, interest, and sympathies with the great barons, could never have formed a really popular chamber, entitled to speak in the name and on behalf of the whole commonalty of the realm. To Simon, Earl of Leicester, belongs the lasting glory of having been the first to admit within the pale of our political constitution the really popular and progressive burgher class, which, together with the freeholders of the counties, constituted henceforth the newly developed third estate of the realm (*f*). This "bold and happy innovation" was effected on December 14, 1264 (49th Henry III.), when De Montfort, in the name of the captive king, summoned his famous parliament to meet at London on the 20th of the following January (*g*). Writs were issued

De Montfort's 2nd parliament. Dec. 14, 1264.

(*d*) See the writ in Rymer, i. 442.

(*dd*) Hist. du Gouv. Représent., ii. 173.

(*e*) "Der Schöpfer des Hauses der Gemeinen" ("the founder of the House of Commons").—Pauli, Simon von Montfort.

(*f*) For an examination of the authorities in favour of an alleged (but apocryphal) earlier representation of towns, and especially the complaint of St. Albans in the 8th Edward II. and the complaint of Barnstaple in the 18th Edw. III., see Hallam, Middle Ages, iii. 28-34, 228. "The novelty was simply the assembling the representatives of the towns in conjunction with those of the counties."—Stubbs, Select Charters, p. 410.

(*g*) On the career of De Montfort, the popular hero and martyr saint, see Blaauw, Barons' War; and Pauli, Simon von Montfort, Graf von Leicester. "A stranger, but a stranger who came to our shores to claim lands and

to all the sheriffs directing them to return not only two knights from each shire, but also two citizens from each city, and two burgesses from each borough (*h*).

Progress of the towns.

The towns of England, from a position of semi-servitude, had slowly attained to the possession of liberty, wealth, and the political franchise. Originally the demesne of the king or other lord, spiritual or temporal, they long continued subject to arbitrary talliage and other exactions; their inhabitants differed indeed but little from the villeins of an ordinary manor. Before the Norman conquest the towns had acquired an individuality distinct from the hundred in which they were locally comprised. Instead of attending at the court leet of the hundred, the townsmen had their own leet, presided over by the elective or nominated reeve, assisted by a body of counsellors, subsequently known as the leet jury. With this primitive organisation, the independent voluntary association of trade guilds ultimately coalesced (*i*). As the boroughs increased in wealth and population, the burghers began to purchase from their lords the *firma burgi*, thus commuting their individual payments for a fixed sum, to be rendered by them in respect of the whole borough, and re-apportioned amongst themselves at their own discretion. The burgesses thus acquired the freehold of their houses and tenements in burgage tenure, which was analogous to that in free socage, being subject only to the suzerainty

honours which were his lawful heritage, he became our leader against strangers of another mould, against the adventurers who thronged the court of a king who turned his back on his own people. The first noble of England, the brother-in-law of the king, he threw in his lot not with princes or nobles, but with the whole people. He was the chosen leader of England in his life, and in death he was worshipped as her martyr."—Freeman, Growth of Eng. Const., 83.

(*h*) See the writ in Rymer, i. 449; and Select Chart., 406.

["With this Act, a form of summoning the *communitates regni* originated with the following innovations:—

i. Not only were representatives of the lesser Crown vassals convened, but the shires and a number of towns, as such, were represented by two members of the body of the shire community and the citizens.

ii. These representatives were directly convened to deal with the business of the nation; no longer, as formerly, merely for the military levies, or for peace negotiations, or for particular judicial and administrative purposes.

"This is therefore the act which originated the later Lower House."—Gneist, Hist. Engl. Const., p. 271, note.—Ed.]

(*i*) *Supra*, pp. 18, 19.

of the lord, and to a fixed annual rent payable to him. During the lapse of two hundred years after the conquest, the citizens and burgesses were enabled to extort, from the pecuniary necessities of the kings, charters of liberties varying greatly in extent, but all conceding more or less of self-government through the medium of elected and representative magistrates (*k*).

Representative machinery first employed for judicial and fiscal purposes.

As in the case of the counties, so in that of the boroughs, the representative machinery was first employed for judicial and financial purposes before its extension to the domain of politics. In the court of the shire - the ancient folk-moot, or assembly of the people– all the national elements had from time immemorial been wont to meet together, the bishops and other dignified clergy, earls, barons, knights, and freeholders in person (*l*); the townships each by their representative reeve and four men. As the boroughs gradually grew into incorporate municipalities, they also sent their representatives to the assembly of the shire. This is apparent from a very important writ, issued by Henry III. in 1231 to the sheriff of Yorkshire, for

Representation of the boroughs in the shire court.

(*k*) The progressive liberties granted to the towns should be studied in the charters of Henry I., Henry II., Richard I., and John, collected in Stubbs, Select Chart., 102-108, 157-160, 256-259, 299-306; and on the difficult and obscure subject of the various constitutions of the cities and boroughs, see his Const. Hist., ii. 216, 232; and Hallam, Midd. Ages, iii. 220. [See also art. "Borough," in Ency. Brit., 11th ed.; F. W. Maitland, Township and Borough (1898); A. Ballard, Domesday Boroughs (1904); S. & B. Webb, English Local Government, 3 vols. (1906-8).]

[The rise of free municipalities is a striking and distinctive feature of the Middle Ages. The origin of towns, in the sense of a defined agglomeration of human habitations, is different in various European countries. The spirit of civic liberty and municipal incorporation first showed itself in Catholic Italy, and, spreading thence, created a bond between the ruins of Rome and the more highly organised Europe of modern times. Germany, after Italy, was the country in which municipal corporations next firmly established themselves, to become the mainspring of its commercial prosperity. Independence followed, resulting in the great trading federation of German cities and towns called the "Hanseatic League." This League was not without direct influence upon the rise of English towns to corporate unity; and traceable to it is the independent spirit which showed itself at this epoch in many of the English seaports.]

(*l*) [As to the personal attendance of the freeholders generally in the county court, after the conquest, Maitland, Const. Hist., writes: "The freeholder was entitled and bound to be present. In such an assembly the tenants-in-chief of the Crown have to meet their own vassals on a footing of legal equality; a tenant may find himself sitting as peer of his own lord."—Ed.]

assembling the county court before the justices itinerant, in which he is directed to summon for that purpose not only the persons already enumerated, but also twelve lawful burgesses as representatives from every borough (*m*).

First symptom of representation of towns in the National Assembly, 1213.

The year 1213, in which the first instance of county representation occurred, is also the date of the first symptom—it can scarcely be termed anything more—of the representation of towns in the central assembly. To the Council (the importance of which has already been pointed out) (*n*) summoned by King John to meet at St. Albans in 1213, and at which the prelates and "magnates of the realm" are stated to have been present, the sheriffs of every county were directed to return from every township in the king's demesne four men and the reeve to estimate the damages lately suffered by the bishops (*o*). This was evidently an adaptation for a particular purpose, by the central government, of the local system of representation long familiar in the constitution of the court of the shire. It is probable that from an early period some of the wealthy burghers of important towns occasionally attended the general assembly. The letter addressed to the pope by the parliament of 1246 is written in the name, not only of "totius regni Angliae barones, proceres, et magnates," but also of "nobiles portuum maris habitatores, necnon et clerus et populus universus" (*p*). We are not, however, justified in attributing any representative character to these barons of the Cinque Ports, or to the other burghers whose presence in parliament is sometimes recorded or implied prior to the year 1265. The only object for summoning representatives of the towns was to secure their consent to taxation, and hitherto the kings

(*m*) The words of the writ are: "omnes archiepiscopos, episcopos, abbates, priores, comites, barones, milites, et omnes libere tenentes, de tota ballia tua, et de qualibet villa, quatuor legales, homines et praepositum, et de quolibet burgo duodecim legales burgenses."—Shirley, Royal Letters, i. 325. Stubbs, commenting on this writ, points out that the county court contained all the elements that were united in the *commune concilium regni* at the time, and in addition the representatives of the townships and boroughs.—Select Chart., 349. [See Maitland, Township and Borough (Selden Society), Camb., 1897.—Ed.]

(*n*) *Supra*, pp. 101, 215-216.

(*o*) *S. a.* 1213. Matt. Paris, 239.

(*p*) Matt. Paris, 700. *Cf.* Arch. Rev., Jan. 1890.

had found it more convenient to treat separately, through the officers of the Exchequer, with each town in the royal demesne.

Transitionary period in constitution of parliament, 1265-1295.

The innovation of Simon de Montfort in calling to the central assembly elected representatives of the boroughs, completed the formation of the national parliament on substantially the basis which it has ever since retained. But its existence during the next thirty years was still precarious. From 1265 to 1295 was a transitionary period; and it is only from the latter year that we can date the regular and complete establishment of a perfect representation of the three estates in parliament. There is no proof that representatives of either counties or boroughs attended the parliaments of the latter years of Henry III.'s reign. The statement, however, in the preamble to the Statute of Marlborough (52 Hen. III.) that the king had called together the more discreet men of the realm "tam ex majoribus quam minoribus" affords a strong presumption that the knights of the shire attended the parliament of 1267 (*q*). A contemporary chronicler, moreover, records the summoning in 1269 of representatives from the cities and boroughs, to assist at the translation of the body of Edward the Confessor to Westminster Abbey, and that on the conclusion of the ceremony a parliament was held, at which a subsidy on the movables of all laymen was granted to the king. But it is not certain that the representatives of boroughs remained for the parliament; indeed, the language of the chronicler would rather seem to imply that they did not (*r*). The fact, however, that they were summoned on this occasion, together with the prelates and magnates of the kingdom, is evidence of the greatly increased importance with which the civic element in the nation was now regarded.

Parliament during latter years of Henry III.

Parliaments under Edward I.

Under Edward I. instances of representation are few, while Great Councils, attended only by the prelates and magnates, are very frequent. With all his good and great qualities, Edward loved the exercise of despotic power, and was evidently loth to admit the commons to a share in the

(*q*) Statutes of the Realm, p. 19; and see Stubbs, Const. Hist., ii 233.
(*r*) *S. a.* 1269. Chron. T. Wykes [Ann. Mon., iv.], 226 [-227].

government. At this period there appears to have been no legal or definite distinction between complete parliaments and Great Councils of the realm. Several of the most important statutes of Edward's reign were passed in assemblies at which no representatives of the commons attended. But even during the first twenty years of his reign, before the force of circumstances had compelled him to yield to popular demands, parliaments, containing representatives from either counties or boroughs, or from both, were occasionally summoned for extraordinary purposes.

1273. At the national assembly, summoned after the death of Henry III. to meet at Westminster on January 14, 1273, to swear allegiance to Edward I., who was still in Palestine, there attended not only the prelates and barons, but four knights from each county, and four citizens from every city (*s*).

First Parliament of Edward I. 1275. On his return to England, Edward summoned his first general parliament at Westminster in April, 1275. In the preambles of the important statutes therein enacted (the Statute of Westminster I. and the statute granting to the king the custom on wool, woolfells, and leather), they are said to be made "by his council and by the assent of the archbishops, bishops, abbots, priors, earls, barons, and the commonalty of the land thither summoned," and the custom is specially said to be granted by the "communitates regni ad instantiam et rogatum mercatorum," as well as by the prelates and barons (*t*).

Extraordinary assemblies. Jan. 20, 1283. In 1283, while the king, the barons, and the military force of the kingdom were at Rhuddlan, intent upon the conquest of Wales, two extraordinary assemblies were summoned, the one at Northampton, the other at York, to raise additional forces and grant subsidies. Writs were issued on November 24 to the sheriffs, ordering them to

(*s*) *S. a.* 1273. Ann. Winton., 113. [Ann. Waverl., 379.]

(*t*) Stat. Westminster I., Statutes of the Realm, i. 26; Palgrave's Parliamentary Writs, i. 2. The presence of representatives of the commons in parliament may also be inferred from the preamble of the statute of Marlebridge (51 Hen. III.), "convocatis discretioribus tam majoribus quam minoribus," repeated in French in the statute of Gloucester (6 Edw. I.), "appelez les plus descrez de sun regne, ausi bien greindres, cum des meindres."

send to Northampton or York, as the case might be, on January 20, 1283: (1) all freeholders, not already with the army capable of bearing arms, and holding lands of more than £20 annual value; (2) four knights from each county having full power for the community of the same county; and (3) two men from each city, borough, and market town, having like power for the community of the same, "ad audiendum et faciendum ea quae sibi ex parte nostra faciemus ostendi" (*u*). The parliamentary proceedings of this year are important, as "marking the point of final transition from the system of local to that of central assent to taxation" (*w*). The king had already, in order to raise funds for the Welsh war, successfully negotiated for a subsidy with the counties and boroughs separately (*x*). But the sums raised not proving sufficient, the necessity for a general grant became apparent, and led to the general assemblies of representatives of the counties and boroughs above described. Convocations of the bishops, abbots, priors, and other heads of religious houses, with the proctors of the cathedral clergy of the provinces of Canterbury and York, were also summoned, through their respective archbishops, to meet at Northampton and York on the same day as the estate of the commons, for the purpose of making a grant to the king (*y*). On the ground that the parochial clergy were unrepresented, the convocation of Canterbury refused to contribute anything; and it was not until after a long delay, during which the diocesan synods were separately consulted, that a "twentieth" (half the sum originally demanded by the king) was at length granted in another convocation, held in November, and attended by two proctors from the parochial clergy of each diocese (*z*).

Parliament of Shrewsbury or Acton Burnell. Sept. 30, 1283.

In June of the same year, Edward, being at Rhuddlan, summoned a national council to meet at Shrewsbury on September 30, for the purpose of passing judgment of

(*u*) Palgrave's Parliamentary Writs, i. 10.

(*w*) Stubbs, Select Chart., 449.

(*x*) See Palgrave, Parliamentary Writs, i. 384, 387.

(*y*) Parl. Writs, i. 10.

(*z*) Stubbs, Select Chart., 452. The convocations of York seem to have been more compliant, but their promised contribution was still unpaid three years afterwards. *Id.* Const. Hist., ii. 118.

treason on David, brother and successor of Llewelyn, Prince of Wales, who had surrendered as prisoner after the conquest of that country.

Besides the earls and barons who were individually summoned, writs were issued (1) to the sheriffs throughout England, directing the attendance at Shrewsbury of two elected knights from each county, and (2) to the magistrates of London and twenty other towns, directing the return from each of two elected representatives "nobiscum super hoc [sc. quid de David fieri debeat] et aliis locuturi" (*a*). This assembly is called by contemporaries the parliament of Shrewsbury or Acton Burnell. Exception has been taken to the use of the word "parliament" in this instance, on the double ground that there is no proof that any of the clergy were present (*b*), and that the representatives of the twenty-one towns were summoned by separate writs, instead of through the sheriffs in the usual way. But however imperfect the composition of this parliament may have been, we have here an unequivocal instance of the representation of both sections of the commons in the central assembly of the nation. The commons would appear to have left David of Wales to be tried by his peers at Shrewsbury, while they themselves adjourned to Acton Burnell, to discuss the "other matters" referred to in the writ. The Statute of Acton Burnell or De Mercatoribus (*c*), though in form an ordinance of the king and his council only, was the outcome of the deliberations of this assembly of the commons.

1290. The next instance is one of county representation only. On June 14, 1290 (18th Edward I.), writs were issued to the sheriffs to send from each shire, to a parliament at Westminster on July 15, two or three elected knights, "ad consulendum et consentiendum pro se et tota communitate comitatus, hiis quae comites, barones, et proceres tunc duxerint concordanda" (*d*). The transitory state of parlia-

(*a*) Parliamentary Writs, i. 16.

(*b*) The fact that the principal object of the assembly was a trial for a capital offence sufficiently accounts for their non-summons.

(*c*) 11 Edw. I., confirmed by 13 Edw. I. c. 3.

(*d*) Report on the Dignity of a Peer, App. i. 54; Palgrave's Parl. Writs, i. 21. Whilst the rule was that each sheriff should require each town in his county to elect a representative to parliament, we find in all the parliaments

ment is peculiarly illustrated by the proceedings of this year. The king had already held a parliament on St. Hilary's Day (Jan. 13), to which the magnates and *proceres* only were summoned. In a second session of this parliament, on the morrow of Holy Trinity (May 29), the prelates, earls, barons, and *proceres* granted for the marriage of the king's eldest daughter ("ad filiam suam primogenitam maritandam") (*e*), (1) that he should take an aid of the same kind and amount as his father King Henry had taken from the kingdom for the marriage of his daughter to the King of Scots, and (2) after reciting that King Henry had only received from each knight's fee two marks (one mark = 13s. 4d.) they further granted that the king, for this turn, should take forty shillings on every knight's fee: but on condition that the present grant should not form a precedent to their prejudice, and that the aid should be levied in the same manner as that granted to King Henry (*f*). It is remarkable that the aid was further declared by the magnates to be granted "pro se et communitate totius regni quantum in ipsis est" (*g*), words which seem to express a doubt of their competency to make a grant, even on the knight's fee, for the whole community, without the presence of the commons, or at least of the minor tenants-in-chief. The aid *pur fille marier* was one of the three ancient feudal imposts excepted from the twelfth section of King John's Magna Carta (*h*), and, even if that section had not been omitted from every subsequent re-issue of the Charter, would not appear, in strict law, to have required a parliamentary authorisation. But the *amount* of the aid in the case of tenants *in capite* was not yet fixed by law (*i*), and hence the necessity for

of Edw. I. only 166 towns *in all* summoned, and of these only 83 summoned and 75 really represented. This depended upon the county government alone, or upon the mode of summoning. The towns which the sheriff *immediately* summoned acquired the permanent right of summons.

(*e*) Rot. Parl., i. 25.

(*f*) *Ibid.*; Palgrave's Parl. Writs, i. 20.

(*g*) Rot. Parl., *loc. cit.*

(*h*) *Supra*, p. 111.

(*i*) The aids payable by the tenants of mesne lords, for making the eldest son a knight or marrying the eldest daughter, had been fixed by the Stat. West. I. 3 Edw. I. *c.* 36, at 20*s.* on the knight's fee. It was not until the 25 Edw. III. c. 11 that the same was done for the tenants *in capite*.

an agreement with them on this point. The hesitation of the magnates to bind the minor tenants-in-chief without their authority seems to mark the deepening sense of the injustice of taxation without consent which seven years later was to culminate in the general restraint on arbitrary exactions embodied in the Confirmatio Cartarum. It was probably in consequence of the doubts entertained by the magnates as to their authority, and also not without a view to a further grant, that the representatives of the shires were summoned on July 15 to give their consent. In the meantime, on July 8, before the commons had arrived, the king, at the instance of the magnates alone ("ad instantiam magnatum regni sui") enacted the celebrated Statute of Westminster the Third or Quia Emptores, by which a stop was put to the practice of subinfeudation (*k*). As both the aid *pur fille marier* and the statute Quia Emptores affected the landowners only, the consent of the citizens and burgesses would not be considered necessary. But that the right to share in general legislation of even that section of the commons which was closely allied to the baronage was not at this time established, is evident from the publication of the king of a statute affecting all landowners with the counsel and consent of the baronage alone, and without the assent of the representatives of the shires. With regard to taxation, however, the latter appear to have effectively vindicated their rights. The aid granted by the baronage was laid aside for a time (it was not enacted till twelve years later, in 1302) (*l*), and in lieu thereof the king appears to have accepted a "fifteenth" from the laity and a "tenth" from the clergy (*m*).

1294. Four years later, on October 8, 1294, the king being in want of money, both for the suppression of the Welsh rebellion and for his projected expedition against Philip

(*k*) *Supra*, pp. 59, 125 n. (*y*).

(*l*) Rot. Parl., i. 266

(*m*) Annal. Dunstapl., p. 362. The documents and other authorities for the constitution of parliament during the transitionary period, 1265-1295, with the valuable comments of Stubbs thereon, should be carefully studied in Select Chart., pp. 420-429, 438-441, 449-455, 457, 464-476.

the Fair for the recovery of Gascony, again summoned to a parliament, which was to meet at Westminster on November 12, two elected knights from each shire "ad consulendum et consentiendum pro se et communitate illa hiis quae comites barones et proceres praedicti concorditer ordinaverint in praemissis." On the following day fresh writs were issued summoning two other knights from each county to attend in addition to those previously called "ad audiendum et faciendum quod eis tunc ibidem plenius injungemus" (*n*). The barons and knights granted a "tenth"; and a "sixth," probably by way of talliage, was exacted from the towns without asking their consent (*o*).

Representation of the three estates of the realm. 1295.

The following year, 1295 (23rd Edward I.), is an important epoch in parliamentary history. It marks the close of the transitionary period and the regular and complete establishment of a perfect representation of the three estates of the realm in a really national parliament (*p*). Edward's difficulties had become serious. The expedition to France was still delayed by the rebellion of the Welsh, and before their obstinate resistance could be subdued, war with Scotland supervened. The French had not only overrun Gascony, but had sent a fleet to the English coast,

(*n*) Report on Dignity of a Peer, App. i. 60.

(*o*) Matt. Westm., 422.

(*p*) "The materials of a parliamentary constitution were ready to his (Edward's) hand, yet it cannot be denied that it is to him we owe its regular and practical establishment. Without a single afterthought, or reservation of any kind, he at once accepted the limitation of his own powers. To the Parliament thus formed he submitted his legislative enactments. He requested their advice on the most important administrative measures, and even yielded to them, though not without some reluctance, the last remnant of his powers of arbitrary taxation. He had his reward. Great as were his achievements in peace and war, the Parliament of England was the noblest monument ever reared by mortal man. . . . He found it a council occasionally meeting to grant supplies to the king, and to urge upon him in return the obligation of observing the charter to which he had sworn: he left it a body representing the nation from which it sprang, and claiming to take part in the settlement of all questions in which the nation was concerned. Many things have changed, but in all main points the Parliament of England, as it exists at this day, is the same as that which gathered round the great Plantagenet."—S. R. Gardiner, Hist. Eng., i. 21. [*Cf.* Gneist, Hist. Eng. Const., cap. 24; Pike, Const. Hist. of House of Lords, p. 43.—Ed.]

which effected a landing at Dover and burnt a convent and several houses on August 1—the very day on which a Great Council had been summoned to meet at Westminster (*q*) to consider, among other things, the proposals of two legates sent by the pope to endeavour to bring about peace between France and England (*r*). The legates were ultimately empowered to conclude a truce (*s*); but the position of the kingdom was still critical, and Edward seems to have felt that he required to be backed up by the whole nation, supporting him as well by their common counsel and approval as by a general and adequate grant of an aid. He accordingly, on September 30, summoned a parliament to meet at Westminster in the November following, so constituted as to represent, and have the power to tax, the whole nation. The summons to the bishops enters with unusual detail into the causes which had rendered it necessary to call parliament together, and is prefaced by a citation from Justinian's Code—"quod omnes similiter tangit ab omnibus approbetur" (*t*)—which happily expresses at once the theory of the earlier Anglo-Saxon constitution, and, as interpreted by the system of representation, both the theory and the practice of the English constitution from the days of the "greatest of the Plantagenets" to our own (*u*). In its beneficent influence upon the development of constitutionalism this maxim of Roman law may be regarded as an antidote to its more famous fellow maxim, "quod principi placuit legis habet vigorem," which, in the mouths of the mediæval jurists, did so much to build up the despotic power of the kingly office. Besides the ordinary summons to the lay and spiritual baronage,

(*q*) Rymer, i. 822.

(*r*) Flor. Wigorn. (Contin.), ii. 276.

(*s*) Rymer i. 825.

(*t*) *Cod.* V., lvi. 5. It occurs also in the canon law, but in a part (Sexta pars Decretal de Regulis juris, c. 30) unpublished in 1295. But it seems to have been familiarly known in England: *cf.* Matt. Paris (anno 1251), p. 815: "quod enim omnes angit et tangit ab omnibus debet trutinari"; and the Vita Edwardi II. (ed. Hearne), p. 111. Stubbs, Const. Hist., ii. 133.

(*u*) The whole preamble of the writs to the archbishops and bishops is remarkable; *cf.* the writs to the lay baronage, sheriffs, elected knights, citizens, and burgesses. Rep. on Dignity of a Peer, App. i. 66, 67.

writs were issued to the sheriffs ordering the election and return of two knights from each county, two citizens from each city, and two burgesses from each borough, "ad faciendum quod tunc de communi concilio ordinabitur in praemissis." But together with the knights and burgesses, the whole inferior clergy, by their representatives under the *praemunientes* clause, were now for the first time united with the assembled baronage in the national parliament. In the writs addressed to the Archbishops of Canterbury and York, each was directed not only to be present at the parliament, but also *premonished* to cause the prior [dean] of his cathedral and the archdeacons of his diocese to attend in person, and the chapter of the cathedral and the parochial clergy by their representative proctors (*w*). This great assembly, the most general which had ever been held, did not form a single body. The aid was discussed and voted by each of the three bodies separately. Each made a different proportional grant. The barons and knights gave the king one-eleventh of their movables, the burgesses one-seventh, the clergy only one-tenth.

Inferior clergy represented in parliament.

The summons to parliament of representatives of the inferior clergy was due, like that of the citizens and

(*w*) Report on Dignity of a Peer, App. i. 66, 67. There were summoned to this parliament, eight earls, forty-one barons, the two archbishops and the bishops, sixty-seven abbots, the masters of the Temple and of Sempringham and the prior of the Hospital of St. John of Jerusalem, the prior [dean] and archdeacons of the dioceses of Canterbury and of York, one proctor from the chapter of each cathedral, and two proctors from the parochial clergy of each diocese, two knights from each county, and two citizens or burgesses from each city or borough in every shire.

["The writs which thus clearly explain the purpose for which the knights of the shire were summoned to the National Council fail, however, to disclose who were the electors of the representative members. From the returns to the writs, it is plain that they were elected *per totam communitatem*, or *in pleno comitatu*, or *per consensum totius comitatus*. . . . The fact has, however, been put beyond question that the mesne tenants (the vavassores of the barons) did attend: and it is equally clear that if the elected knights were chosen by a mere fractional part of the Shire Court, the election could not have been described as the act of the whole community *in pleno comitatu*. The weight of authority, or rather of inference, sustains the conclusion that the elected knights were not only the representatives of the whole shire community, but that they were chosen by the whole body of freeholders in full County Court."—Taylor, Engl. Const., p. 467; but see also Maitland, Const. Hist., pp. 40 *seq.*—Ed.]

burgesses, to the pecuniary necessities of the king, controlled by the principle expressed in the maxim, "what touches all should be approved by all," that taxation could only be legally imposed with the consent of the taxed. It was doubtless the intention of Edward's legal and systematic mind to make the representatives of the clergy an effective branch of a comprehensive national parliament. But this design was defeated by the action of the clergy themselves.

The clergy averse from interfering in secular legislation.

Averse, by the nature of their calling, from interfering in the ordinary subjects of secular legislation, despising as barbarous the system of common law, and desirous of keeping themselves as a privileged class apart from the body of the people, they unwillingly obeyed a summons the primary object of which they well knew was to get from them as much money as possible. The clergy, moreover, had long

Convocation.

possessed their own peculiar assembly or convocation which, earlier in the reign of Edward I., had already been remodelled upon the representative basis (*x*). In this assembly, sitting in two provincial divisions, at London and York, they preferred to grant their aids; and, although regularly summoned to parliament, under the *praemunientes* clause, their attendance was always reluctant

The clergy cease to attend parliament in the 14th century.

and intermittent, and in the fourteenth century ceased altogether. But whether in convocation or in parliament, "they certainly formed a legislative council in ecclesiastical matters, by the advice and consent of which alone, without that of the commons (I can say nothing as to the Lords), Edward III. and even Richard II. enacted laws to bind the laity" (*y*). For two hundred years after they had ceased to attend parliament, the clergy retained the strictly parliamentary function of taxing themselves in convocation. But from the reign of Henry VIII., when the reformed church, which in its national aspect was itself the creation of parliament, was placed in strict subordina-

(*x*) See the series of summonses to convocation, 1225-1227, in Stubbs, Select Chart., 442, and the Introductory Sketch, p. 38.

(*y*) Hallam, Midd. Ages, iii. 137. The celebrated statute De Haeretico Comburendo, 2 Hen. IV. c. 15, 1401, was enacted on the petition of the clergy alone, and is expressed as being made by the consent of the lords but without mention of the commons.

tion to the state (*z*), the subsidies granted in convocation were henceforward always confirmed by Act of Parliament. At length, in 1664, the practice of ecclesiastical taxation was discontinued, without the enactment of any special law, and the clergy, being henceforth taxed at the same rate and in the same manner with the laity, assumed and have ever since enjoyed the right of voting in respect of their ecclesiastical freeholds, in the election of members of the House of Commons (*a*).

The clergy not now a separate estate of the realm.

Thus, while theoretically the political constituents of the nation are the king, and the three estates of the realm, the lords, the clergy, and the commons, practically there are and have been for centuries but two estates, the lords and commons. The clergy are now a separate estate only by a political and legal fiction. In fact they are amalgamated with the two continuing estates, and are represented in the lords by the bishops, in the commons by the members of that House, who are elected by all qualified persons, whether clerical or lay, below the rank of peerage.

Government by king, lords, and commons.

Ever since the year 1295 (23rd Edward I.) parliaments after the model of Simon de Montfort's famous assembly have been regularly summoned in continuous, or all but continuous, succession. The essential basis of the English constitution, government by king, lords, and commons, may thus be said to have been definitely fixed in the reign of the great Edward. To the same period we must also assign the full and complete acknowledgment of the most important—because the practical mainspring of every other power of parliament. It was long before the king would surrender the right of taking talliages without a parliamentary grant. In order to carry on his extensive wars he was in constant need of large sums of money, which he raised by arbitrary exactions from all classes of his subjects, lay and clerical. In vain did the clergy endeavour to

Right of arbitrary taxation surrendered.

Exactions from the clergy.

(*z*) By 25 Hen. VIII. c. 19, convocation was forbidden to [enact constitutions or canons] without the king's licence. [*Cf.* Gneist, Hist. Engl. Const., p. 396, and note.—Ed.]

(*a*) The taxation of the clergy out of convocation was termed [by Bp. Gibson] "the greatest alteration in the constitution ever made without an express law." It was settled by a mere verbal agreement between Archbishop Sheldon and the Lord Chancellor Clarendon.—See Hallam, Const. Hist., iii. 240, 241.

shelter themselves under the bull of Boniface VIII., *Clericis laicos* (February 24, 1296), which absolutely forbade, under pain of excommunication, the payment to laymen of any tax whatever on the revenues of the church. The practical outlawry of the whole clerical body (January 30, 1297), and the temporary confiscation of the estates of the see of Canterbury (February 12, 1297), compelled the clergy to abandon their untenable position (*b*) [and to yield *per se*, or *per mediatores*].

Exactions from the merchants

Whilst the clergy were exasperated by these violent proceedings, the merchants were equally aggrieved by the heavy impositions placed on the export of their wool by the actual seizure of the greater part of it, for which payment was nominally given by tallies upon the Exchequer. Large quantities of provisions were, in the same manner, exacted from the men of each county for the king's expedition to Flanders, and, in the words of the old chronicler, "multae fiebant oppressiones in populo terrae" (*c*).

Infractions of Magna Carta.

The baronage also were irritated by the king's open disregard of many of the provisions of the Great Charter, and the Charter of the Forest, both of which he persistently refused to confirm.

Foreign service.

They had, moreover, a personal grievance in the king's demand of foreign service, which they alleged that neither they nor their ancestors had ever been liable to perform (*d*). On February 24 Edward held what was styled a "parliament," but to which only the lay baronage, without any clergy or representatives of the commons, was summoned. He here proposed that the barons should go to Gascony, while he himself proceeded to Flanders. On their refusal (*e*), he threatened to take away their lands and give them to those who would go.

(*b*) Ann. Trivet., p. 353, *s. a.* 1297. ["The clergy of the two provinces refusing to be jointly assembled as an Estate of Parliament continued to tax themselves in their provincial convocations until after the Restoration of Charles II."—Taylor, Engl. Const., p. 481. *Cf.* Atterbury, Parliamentary Original Rights of the Lower House of Convocation (1702), p. 7, and May, Parl. Practice, p. 637, and note 1.—Ed.]

(*c*) Walt. de Hemingburgh, ii. 120, *s. a.* 1297.

(*d*) W. Rishanger, Chron., 175, *s. a.* 1297. [*Petitiones Communitatis.*]

(*e*) *Cf.* the refusal of foreign service by St. Hugh of Lincoln in 1198 (*supra*, p. 92), and by the barons of King John (*supra*, p. 98).

This led to a personal altercation with Roger Bigod, Earl of Norfolk, the Marshal of England (*f*), which ended in the breaking up of the assembly, and the withdrawal of the Marshal, and of Bohun, Earl of Hereford, the Constable, who, supported by a large number of the magnates and a force of 1,500 cavalry, stopped the king's officials from seizing the wool, hides, and other commodities on their estates, and resolutely prepared for armed resistance (*g*).

The Earls of Hereford and Norfolk.

On May 15, Edward issued writs to the bishops, barons, and sheriffs for a general military levy of all the landholders of the kingdom whose lands were of £20 annual value and upwards, whether tenants in chief or holding of mesne lords. They were to assemble in London on July 7, with horses and arms, ready to cross the sea under the king's personal command (*h*). On the 7th the force met; the constable and marshal, when called upon by the king, refused to perform the duties of their offices, in taking the lists of the army, and at their own request were superseded. The summons of the whole force of the kingdom for the purpose of an aggressive foreign war was such a violent straining of the military obligations, alike of feudal tenants and national militia, that the two earls might well have based their refusal on the broad ground of the unconstitutionality, if not of the illegality, of the king's proceedings. They chose, however, to base their refusal on what looks very like a bit of special pleading as to the wording of the summons. Edward, distrustful apparently of the legality of his position, had employed the words "affectuose requirimus et rogamus," instead of the usual imperative formula, in his summons to the earls and barons, and the constable and marshal professed to have regarded this as a mere informal invitation, and not a legal summons (*i*). Their answer had probably been deliberately determined upon as most appropriate in the circumstances; for we know from Matthew of Westminster that the earls

(*f*) The altercation is graphically described by Walter de Hemingburgh (ii. 121).

(*g*) Walt. de Hemingburgh, ii. 121-2.

(*h*) Palgrave's Parl. Writs, i. 281. A preliminary writ to the sheriffs to summon the landholders, but without specifying the intended voyage beyond sea, was issued on May 5.

(*i*) Matt. Westm., p. 430; Stubbs, Const. Hist., ii. 140-41.

and barons had been concerting their measures in what he terms a parliament of their own ("parliamentum suum") in the forest of Wyre in the Welsh march. In dealing with a man of Edward's well-known legal affinities, they might have thought it prudent in the coming contest to cover themselves with the shield of technical legality, while at the same time accentuating the fact, which might otherwise have been overlooked, that the king had not ventured to command what they alleged, and he himself ultimately admitted, to be an illegal requisition (*k*). Hallam's eulogium upon these two leaders of the political party, which forced from the king the Confirmatio Cartarum, may require some qualification. They were probably actuated quite as much by personal claims as by motives of true patriotism. But whatever were their motives, it is mainly to their combined courage and prudence, and to the patriotic exertions of Archbishop Winchelsey, that we owe the addition of "another pillar to our constitution not less important than the Great Charter itself" (*l*). In his extremity, Edward determined to appeal to the people. Having made friends with the archbishop, and restored the confiscated lands of the see of Canterbury, he proceeded, on July 14, to make a public harangue, standing upon a wooden stage erected in front of the great hall at Westminster, and accompanied by his young son Edward (afterwards Prince of Wales), together with the archbishop and the Earl of Warwick. With visible emotion ("erumpentibus lacrymis" are the words of the chronicler) he humbly asked forgiveness for his past acts, admitting that he had not governed them so well and peaceably as became a king; but reminding them that such small portions of their property as they had given him, or as his servants without his knowledge had extorted, had been accepted by him in order that by the expenditure of a part the bulk might be possessed in greater quietude, and that he might be enabled to overcome the injurious attempts of

Edward's speech to the people.

(*k*) From Bartholomew de Cotton (Hist. Ang., p. 327) we learn that in the same year "concessit dominus rex omnibus qui debebant sibi servitium, et omnibus viginti libratas terræ habentibus, *non teneri ire secum in Flandriam, nisi ad vadia et pro stipendiis dicti regis.*"

(*l*) Hallam, Middle Ages, iii. 3.

enemies who were thirsting for English blood. "Behold," he added, "I am going to expose myself to danger for your sakes; I pray you, if I return, receive me as you have me now, and I will restore to you all that has been taken. But if I return not, crown my son as your king" (*m*).

The hearts of the people were touched by this politic and affecting address: and with uplifted hands they promised fealty to the king. But Edward was still in want of money: and the barons, when appealed to, insisted on the various grievances of the nation, and demanded the confirmation of the Charters. By promising to comply with this demand the king ultimately, after many of the barons had departed, induced an irregular assembly of some of the barons and others who had attended the military summons, to make an illegal grant of an "eighth" from the barons and knights and a "fifth" from the towns (*n*). After a vain effort to negotiate with the absent constable and marshal, Edward gave orders (July 30) for the collection of the eighth and fifth, and again directed the seizure of all the wool of the kingdom, promising to pay for it as soon as he was able (*o*). The clergy, who were still hampered by the prohibitions of the bull *Clericis Laicos*, expressed (Aug. 10) their willingness to make a grant as soon as they could obtain the pope's permission, which they had good hopes of getting (*p*). But the king, impatient at the delay, directed the seizure of a third of their temporal goods (*q*). A few days previously he had issued a manifesto to the people justifying his action in the dispute with the two earls, excusing his exactions as being necessary for the defence of the nation, and promising to set all things right on his return (*r*). Shortly afterwards, while the king was at Winchelsea preparing to embark,

(*m*) Matt. Westm., p. 430.

(*n*) *Ibid.*

(*o*) Rot. Parl., i. 239; Barth. Cotton, Hist. Ang., 338.

(*p*) Barth. Cotton, Hist. Ang., 327, 335.

(*q*) Palgrave, Parl. Writs, i. 396. All articles dedicated to spiritual purposes were excepted, and clerks whose benefices were under 5 marks in value were exempt. Lay fees of the clergy, not appurtenant to their churches, were to be taxed with those of the laity; but they might be quit of the whole by payment of a fifth of their goods temporal and spiritual.

(*r*) Rymer, i. 372; Stubbs, Const. Hist., ii. 143.

A Grand Remonstrance presented to the king.

messengers arrived from the earls and presented to him what, to anticipate the language of a later age, may be termed a Grand Remonstrance in the name of the "archbishops, bishops, abbots and priors, earls and barons, and the whole community of the land," setting forth the evils of which they complained and demanding redress (*s*). (1) In the first place, they said, it seems to the whole community of the land that the summons made to them by the king's writ was not sufficient, because it did not mention any certain place to which they were to go; yet it was on the place that the nature of the outfit and requisite amount of money depended. But whether they were bound to serve or not, it was commonly said that their lord wishes to cross the sea to Flanders, and it seems to them that they are not bound to perform any service whatever: for neither they nor their predecessors or ancestors ever served in that land. Even if they were bound to serve there or elsewhere, yet they have not the necessary means: so afflicted are they by divers talliages, aids, and prises (to wit, of corn, oats, malt, wool, hides, oxen, kine, salt meat), exacted without payment of a single penny by which they might sustain themselves. (2) Further, they say they are unable to grant an aid, because of their poverty arising from the aforesaid talliages and prises; for they have hardly wherewithal to support themselves, "et multi sunt qui nullam sustentationem habent, nec terras suas colere possunt." (3) They are not dealt with ("tractantur") according to the laws and customs of the land as their ancestors were wont to be dealt with, nor have they the liberties which they were wont to have, but are arbitrarily refused them; for they were wont to be dealt with in accordance with Magna Carta, but now all its provisions are disregarded to the exceeding damage of the whole people. Wherefore they beseech their lord the king to correct these things, both for his own honour and the salvation of his people. (4) Moreover, the community of the land feels itself sorely aggrieved by the Assize of the Forest, which is not kept as formerly; neither is the Charter of the Forest observed, but attachments are made

(*s*) [*Cf.* Hemingburgh, ii. 121.]

at will, beyond the jurisdiction, contrary to custom. (5) The tax on wool is too heavy, namely 40s. on each sack, and of broken wool 7 marks [= £4 13s. 4d.] per sack; for the wool of England amounts to the value of half the whole land, and the tax paid on it to a fifth part of the whole land. (6) Lastly, the community wishing, as it ought to wish, honour and safety to the king, considers it not for the king's good that he should go into Flanders unless he have further assurance as regards the Flemings, both for himself and his people; and further, on account of Scotland, which is already beginning to rebel now that he is going, and will assuredly do worse when they know that he has crossed the sea. Nor is it Scotland only that has to be considered: there are other lands also which are not yet duly secured (*t*).

To this Remonstrance the king declined to return any specific answer without the advice of his Council, part of which had already sailed for Flanders while the other part was in London (*u*). A few days afterwards (Aug. 22), he himself proceeded to Ghent, leaving his son, Edward, Prince of Wales, as regent. As soon as the king had departed, the earls seized the opportunity to press their demands. Entering the Exchequer they peremptorily forbade the barons there to levy the aid, the grant of which they asserted had been illegally obtained, until the charters had been confirmed. Supported by a large military following, and backed up by the citizens of London, they were masters of the situation, and the young prince and his Council found it necessary to yield. The Confirmatio Cartarum (*w*) which, although a statute, is drawn up in the form of a charter, was passed on October 10, 1297, in a parliament at which knights of the shire attended as representatives of the commons, as well as the lay and clerical baronage. It was immediately sent over to King Edward at Ghent, and there confirmed by him on November 5 following (*x*). The former grant of an eighth

Confirmatio Cartarum 1297.

(*t*) Rishanger, Chron., 175-176 [*s. a.* 1297].
(*u*) *Ibid.*
(*w*) 25 Ed. I., st. 1, c. 6.
(*x*) In 1298, the Earls of Hereford and Norfolk, doubting the king's sincerity or the binding force of his confirmation at Ghent of his son's acts,

and a fifth was treated as invalid, and a fresh grant of a ninth was substituted (*y*). The constitutional opposition had now been completely successful. The Confirmatio Cartarum was not merely a re-issue of Magna Carta and the Charter of the Forest, with special provisions for their distribution throughout the realm and annual publication, but the enactment of a series of new provisions intended to deprive the crown in the future of its assumed right of arbitrary taxation.

By the fifth section of this statute the king expressly renounced as precedents the "aids, tasks, and prises" before taken. The next section proceeds:

"vi. Moreover, we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of the holy Church, as also to earls, barons, and to all the commonalty of the land, that for no business from henceforth *will we take such manner of aids, tasks, nor prises, but by the common consent of* [*all*] *the realm, and for the common profit* thereof, saving the ancient aids and prises due and accustomed."

By section vii. the "maltolte of wools, that is, to wit, a toll of forty shillings for every sack of wool," is released, and the king grants "that we shall not take such thing nor any other" without the common consent and goodwill of the commonalty of the realm, "saving to us and our heirs the custom of wools, skins, and leather granted before the commonalty aforesaid" (*z*).

The saving words in this statute would appear to have preserved to the king the ancient custom on wool (as

demanded a second formal confirmation. This the king reluctantly granted on March 8, 1299, but with a comprehensive proviso, as to the forests, saving the rights of the crown ("salvis semper juramento nostro, jure coronae nostrae, et rationibus nostris atque calumpniis ac omnium aliorum"). The openly expressed discontent of the people at this unlooked-for reservation induced Edward to repeat the process shortly afterwards without the obnoxious "salvo." The charters were twice again confirmed by Edward, in the *Articuli Super Cartas*, on March 6, 1300, and finally on February 14, 1301, in return for a subsidy of a "fifteenth." Notwithstanding this, Edward secretly sought and obtained, in 1305, from pope Clement V. an absolution from the observance of the Confirmation of the Charters; but to his credit, be it said, the absolution, except as to the Forest Articles, was never acted upon.

(*y*) Palgrave's Parl. Writs, i. 63.

(*z*) Statutes of the Realm, i. 124.

distinguished from the "evil toll"), and even the legal right of talliaging the towns and royal demesne, a right which he exercised in 1304 (*a*). But although not formally taken away, talliage without consent of parliament was clearly contrary to the interpretation of this statute given in the *De Tallagio non Concedendo*. This document is now admitted not to have been an actual statute, but we are at least justified in regarding it "as good evidence of a principle which, from the time of the Confirmation of the Charters, has been universally received" (*b*). The exclusive right of parliament to impose taxation, though often infringed by the illegal exercise of prerogative, became from this time an axiom of the constitution (*c*).

De Tallagio non Concedendo. 1297.

(*a*) See the king's writ in Rot. Parl., i. 266. There was also an "ancient prise" of wines imported—a duty of two tuns from every vessel.

(*b*) Freeman, Growth of English Constitution, [195].

The "Statutum de Tallagio non Concedendo" is quoted as a statute in the preamble of the Petition of Right, and *thenceforth* acquired the authority of a statute. In 1637 it was decided to be a statute by the judges; but there is now no doubt that originally it was a mere "abstract, imperfect and unauthoritative, of the regent's act of confirmation and of the pardon of the two earls."—See Stubbs, Select Chart., 487-98; and Hallam, Midd. Ages, iii. 4, n.

(*c*) ["The right to grant taxes, which had been continuously contended for since Magna Carta (1215), had, at length, after the course of a century, been won, and won, moreover, upon the broad basis of the right of those classes who actually paid the State taxes."—Gneist. Hist. Engl. Const., p. 364.—Ed.]

CHAPTER VIII.

GROWTH OF PARLIAMENT.

(1295—1399.)

23 EDWARD I.; EDWARD II.; EDWARD III.; RICHARD II.

The national parliament gradually wins back an active control over all the affairs of the nation.

We have seen that under Edward I. the Commune Concilium Regni, which for a time, after the Norman conquest, had been absorbed into the feudal Curia Regis, again emerged as a really national parliament, in which all the political elements of the nation were present either in person or by representation. But although complete in its representative character, parliament had yet, as a whole, to make good its powers; and the newly admitted commons to vindicate their right to an equal, and ultimately to a preponderating, share in the government of the country. The king was at all times in theory bound to act with the "counsel and consent" of the great assembly of the nation. But by the overthrow of the old feudal party under Henry II., and the break-up of the new national combination which, until the death of De Montfort, had successfully opposed the misgovernment of Henry III., the king had in reality acquired and exercised, through the medium of his Continual or Ordinary Council, a power little less than despotic. In the growth of parliament, from the date of its definite establishment under Edward I., we shall trace the process by which the national council gradually won back the active control over all the affairs of the nation, which the ancient witenagemot always, and even the feudal Great Councils at times, had undoubtedly exercised (*a*).

(*a*) The comprehensive functions of the witan have already been discussed, *supra*, pp. 29 *seq.* Freeman (Norm. Conq., ii. 90) cites an instance of a debate in the witenagemot under Edward the Confessor, on a question of war or peace. An early instance of control by the national

Parliament divided into two Houses.

The exact date of the division of parliament into two Houses is not quite clear, but it was completely effected before the middle of the fourteenth century (*b*). It must be borne in mind that the commons consisted of two elements, the knights of the shire and the burgesses. The knights belonged socially to the same class as the barons, and had, moreover, originally possessed an equal right with them to attend in person. On the introduction of county representation the knights of the shire, although elected not merely by the immediate tenants of the king, but by all the freeholders of the county, naturally continued to sit, deliberate, and vote with the greater barons (*c*).

council over the public expenditure had occurred a few years previously, in 1237, when the thirtieth granted to the king as the price of one of his numerous confirmations of the Charter had been paid into the hands of four of the barons to be expended at their discretion "for the benefit of the king and kingdom."—Matt. Paris, 581, 582.

(*b*) The first mention of the Rolls of Parliament of a separate session occurs in 1332 (Rot. Parl., ii. 66). From 1339 the division may be regarded as permanent. In 1352 the Chapter House of Westminster Abbey was the Chamber of the Commons (Rot. Parl., ii. 237; Stubbs, Const. Hist., iii. 444, 445). The advantages of the "bi-cameral system" as a guarantee for orderly and permanent government have been forcibly stated by the American writers, Kent, Story, and Lieber, and by Jeremy Bentham and Bowyer in our own country. A brief summary of them is given in Creasy, Eng. Const., 198. But it should be noted that it was only the *accidental* circumstance of the withdrawal of the clergy from all interference in secular legislation that prevented us from having, as was generally the case in continental constitutions, *three* houses of nobles, clergy, and commons.—(*Supra*, pp. 231 *seq.*). Stubbs (Const. Hist., ii. 198) points out that there was even at one time a possibility that the lawyers and the merchants might have been grouped in separate sub-estates. [On the division of parliament into two Houses, *cf.* Gneist, Hist. Engl. Const., pp. 376 *seq.*; Hallam, Midd. Ages, vol. iii. p. 38; Taylor, Engl. Const., 479; and Pike, Const. Hist. of House of Lords, p. 322, who says: "Various opinions have been advanced in relation to the time at which the lords and commons began to sit in two separate Houses. . . . It is difficult to prove when a permanent physical barrier was set between the two Houses: it is easy to show that the two assemblies were always distinct."—Ed.]

(*c*) [The late Editor, Mr. Carmichael, took exception to this statement; it seems, however, likely that the knights of the shire were often at parliament in a twofold capacity, and deliberated as *gentz du conseil du roi* and actually often voted with the barons. In this connection, *cf.* the following extract from Gneist, Hist. Engl. Const., p. 379, note: "In 6 Edward III. it was laid down that the clergy deliberated for itself, the earls, barons, and other *grantz* for themselves. The ordinances which had been proposed (for the maintenance of the peace) were approved by the king, the prelates, earls, barons, and other *grantz*, and by the knights and *gentz du commun*. But thereupon the commons and the clergy were dismissed; the prelates, earls,

But the representatives of boroughs, belonging to a lower social grade, and entering parliament in virtue of a newly acquired right, formed from the first a distinct assembly, deliberating and voting apart. Whether they sat in a separate chamber, or at the bottom of Westminster Hall, while the lords and knights occupied the upper end, is a matter of little importance. The separation of the burgesses is evident from the grants of subsidies which, for many years after the introduction of the commons, were voted in different proportions by (1) the earls, barons, and knights, (2) the clergy, and (3) the citizens and burgesses (*d*). There is reason to believe that the knights, even while still voting apart, occasionally joined with the burgesses in petitions. In the 8th of Edward II. (1315) "the commons of England [in another part of the record they are termed "le people"] complain to our lord the king and his council"; and there are several other petitions in the 19th of the same king, from the body of the commons in parliament ("voz liges gentz . . . pur tote la com[m]une, les gentz de la com[m]une de vostre roialme") (*e*). At length, in 1347, we find the commons, without distinction, granting two-fifteenths from the cities, boroughs, ancient demesnes of the crown, and the counties. The complete fusion of the two elements of the Lower House into one assembly—the result of one of those unions of happy accident and practical wisdom to which the English

Union of knights and burgesses in one House.

barons and *gentz du conseil du roi* remained behind, as the king required their advice on important matters (Peers' Report, i. 304). In the following Parliament, 6 Edw. III., the prelates deliberated alone; the earls, barons, *et autres grauntz* alone and the knights of the shire alone. Then the money grant was taken: prelates, earls, barons, *et autres grauntz* and then the knights of the shire *et tote la coe*" (Rep. App. iv. 411). *Cf.* also Clifford, Private Bill Legisl., i. 275.—Ed.]

(*d*) In 1296, the barons and knights and the clergy gave each a twelfth, and burgesses an eighth; in 1305 the barons and knights and the clergy gave a thirtieth, the burgesses a twentieth; in 1308 the barons and knights gave a twentieth, the clergy and the burgesses each a fifteenth. In the 6th of Edward III. (1333) the rates were for the barons and knights and the clergy a fifteenth, for the burgesses a tenth; but on this occasion the knights and burgesses deliberated, although they did not vote, in common. In 1345 the knights granted two-fifteenths, the burgesses one-fifth, while the lords promised to follow the king in person and granted nothing.—Parl. Hist., i. 206; Rot. Parl., ii. 66.

(*e*) Rot. Parl., i. 430.

constitution owes so much—was fraught with the most important consequences. The knights, who represented the landed property of the country, gave to the House of Commons, from the first, stability, weight, and permanence, and obtained for it a respect which the citizens and burgesses alone could not have commanded, in a country so permeated with feudal ideas as England then was. Without the knights of the shire the burgesses would have been mere deputies to consent to taxation and advise on matters of trade: united with them on equal terms, they were enabled at once to claim a voice in the government of the nation, and to defend the liberties of the people against both king and nobles. The commingling of the knights and burgesses in a single House was rendered possible by the existence in the English constitution of a peculiarity which most prominently and honourably distinguished it from nearly every kindred constitution in Europe—the absence of an exclusive noble caste. In most of the continental states the nobles formed a distinct class, distinguished by privileges inherent in their blood, from ordinary freemen, and transmitting their privileges, and in some countries their titles also, to *all* their descendants in perpetuity. The words "nobleman" and "gentleman" were strictly synonymous: the estate of the nobles (wherever the system of estates obtained) represented in the national assembly not only the high nobility, but the class who in England formed the "landed gentry," and the commons, the "tiers état," consisted almost exclusively of the citizens and burgesses. In England, on the contrary, the privileges of nobility have always, except perhaps in the days of the ancient earls, been confined to one only of the family at a time, the actual possessor of the peerage. The sons of peers are commoners, and on a perfect equality, as regards legal and political privileges, with the humblest citizen. Even the eldest son, the heir to the peerage, though he may bear a title by courtesy, is still, so long as his father lives, a commoner like his younger brothers (*f*).

A nobility, but no noble caste in England.

(*f*) "As the law of England knows all classes of men except peers and commoners, it follows that the younger children of the king—the eldest is born Duke of Cornwall—are, in strictness of speech, commoners, unless they are personally raised to the peerage. I am not aware that either case

Civil equality of all ranks below the peerage.

No restraint seems ever to have lain upon the free intermarriage of all ranks (*g*). The highest offices of the state were always legally open to all freemen. All ranks, moreover, have at all times borne a share of the public burthens without claiming any of those unjust exemptions from taxation which the continental *noblesse* habitually enjoyed.

Few things are more important in our early constitution, or have exercised a more potent and beneficial influence upon the political and social condition of the people, than this civil equality of all ranks below the peerage. Had it been otherwise, the House of Commons could scarcely have become what it is at the present day. "The knight of the shire was the connecting link between the baron and the shopkeeper. On the same benches on which sat the goldsmiths, drapers, and grocers, who had been returned to parliament by the commercial towns, sat also members who, in any other country, would have been called noblemen, hereditary lords of manors, entitled to hold courts and to bear coat armour, and able to trace back an honourable descent through many generations. Some of them were younger sons and brothers of great lords. Others could boast even of royal blood. At length an eldest son of the Earl of Bedford, called in courtesy by the second title of his father, offered himself as a candidate for a seat in the House of Commons (*h*), and his example was followed by

has ever arisen, but I conceive that there is nothing to hinder a king's son, not being a peer, from voting at an election, or from being chosen to the House of Commons, and I conceive that, if he committed a crime, he would be tried by a jury."—Freeman, Growth of Eng. Const., 193, 195.

(*g*) "It was regarded as no disparagement for the daughter of a duke, nay, of a royal duke, to espouse a distinguished commoner. Thus Sir John Howard married the daughter of Thomas Mowbray, Duke of Norfolk, Sir Richard Pole married the Countess of Salisbury, daughter of George, Duke of Clarence. Good blood was indeed held in high respect; but between good blood and the privileges of peerages, there was, most fortunately for our country, no necessary connection. There was therefore here no line like that which in some other countries divided the patrician from the plebeian. Our democracy was, from an early period, the most aristocratic, and our aristocracy the most democratic in the world."—Macaulay, Hist. Eng., i. 30, 31.

(*h*) "It was decided by votes of Parliament, both in the reign of Henry VIII. and in that of Elizabeth, that the eldest son of the Earl of Bedford was entitled to sit in the House of Commons."—Earl Russell, Eng. Gov. and Const., 11.

others" (*i*). In this way the House of Commons has at length come to represent not any single order in the state, but, with the exception of the actual members of the House of Lords, the whole nation; and, as a natural consequence, has drawn to itself "the predominant authority in the state" (*k*).

Growth of the powers of the Commons.

But the growth of the powers of the commons has been very gradual. At first the burgesses deferred to their aristocratic associates, the knights of the shire, and these naturally followed the lead of the barons.

EDWARD II. 1307-1327.

Under Edward II., jealousy of the successive favourites, Gaveston and the Spencers, threw the baronage into chronic opposition to the king; and on two occasions, in 1312 and again in 1321, drove them into open revolt. The ultimate deposition of the king was also mainly the work of the barons acting in concert with the queen. But it is noteworthy that in all these proceedings the sanction of parliament was always regarded as necessary to legalise them; and the commons, while acting in subservience to the lords, were in reality gradually consolidating their own power. The appointment (*l*) of the "Lords Ordainers" (twenty-one in number), in 1310, like the previous appointment of similar committees in the reigns of John and Henry III., and of the subsequent commissions of reform under Richard II., was an extraordinary and revolutionary remedy to meet exceptional circumstances. At the time when kings governed as well as reigned, their personal character was of the utmost importance. The practical effect to the nation was much the same whether the king was wicked or only weak. When, from either cause, misgovernment reached a certain pitch of intensity, an attempt

The Lords Ordainers.

(*i*) Macaulay, Hist. Eng., i. 38.

(*k*) May, Const. Hist., ii. 83; see also Freeman, Growth of Eng. Const., 96. The difference between the House of Commons as representing "the whole community of England" and the House of Lords as representing only themselves, is strongly insisted upon by the writer of the "Modus Tenendi Parliamentum." The date of this treatise is uncertain, but it "is found in manuscripts of the 14th century, and is shown by contemporary writs and records to be a fairly credible account of the state of Parliament under Edward II." (Stubbs, Select Chart., 492-502.)

(*l*) Stubbs (Const. Hist., ii. 342, n. 2) says: "Hallam was mistaken in supposing that the Commons co-operated" in the appointment.

appears to have been made to reconcile the continuance of the king upon his throne with the enjoyment of good government by the people, by temporarily putting into commission, as it were, the powers of the kingship. In Edward II.'s case, it was doubtless the personal jealousy of the barons against Gaveston and the king's other favourites, quite as much as a desire for the public weal, which actuated the Ordainers. Yet most of their comprehensive Articles of Reform, by which remedies were provided for the old and undoubted grievances of the nation, were highly beneficial; and others, which trenched on the prerogative of the crown, were in many cases but anticipations of that direct parliamentary control over the appointment of the king's ministers, and the action of the executive, which was subsequently attained for a time, and which is now exercised by parliament indirectly. Among the Articles of this nature may be noted: (ix.) That the king should not leave the kingdom, or levy war, without the consent of the baronage in parliament; and in the case of his absence with such consent, a guardian of the realm should be chosen by the common assent of the baronage in parliament; (xiv.) That the chancellor, two chief justices, treasurer, and other great officers of the crown, should be chosen by the counsel and assent of the barons in parliament; and (xxix.) That to prevent delay in the administration of justice, parliaments should be holden once in every year, or twice if need be, and in convenient places (*m*).

Articles of Reform. [1312.]

So early in this reign as 1309, the commons manifested a knowledge of their power and rights by granting a subsidy "*upon this condition* that the king should take advice and grant redress upon certain Articles, in which their grievances were set forth." These Articles, eleven in number, present a concise summary of the grievances—arising in many cases from distinct violations of the existing law—by which the nation had been more or less oppressed under all the successors of Henry of Anjou, which the Lords Ordainers endeavoured to redress in 1311,

Subsidy granted on redress of grievances.

(*m*) Rot. Parl., i. 281. The Ordinances were annulled by st. 15 Edw. II. (1322), but several of the most popular were re-issued by the king in a Royal Ordinance. *Ibid.* 456.

but which continued for at least another century to form the burthen of the complaints of the commons in parliament (*n*). They are to the following effect: "Les bones gentz du roialme qi sont cy venuz au Parlement," after a general prayer for the observance of the Great Charter, and that the oppressions of "those who call themselves the king's servants" may be restrained, specifically complain: 1. That the king's purveyors seize great quantities of corn, malt, meat, and other provisions, without any payment, not even by tallies. 2. That new customs are exacted on wine, cloth, and other imports, whereby the price to the people is enhanced. 3. That the current coin is accepted by traders at only half its nominal value, notwithstanding the king's proclamation to the contrary. 4, 5. That the steward and marshal illegally enlarge their jurisdiction beyond measure, to the oppression and impoverishment of the people. 6. That the commons find no one to receive petitions in parliament, as in the time of the king's father. 7. That the collectors of the king's dues ("pernours de prises") at fairs and in cities take prises of commodities in excess of the king's needs, and barter away the surplus for their own advantage. 8. That men are delayed in their actions at law by writs of protection. 9. That felons escape punishment by too easily procuring charters of pardon, so that those who have indicted them are afraid to stay in their own districts, and many forbore, on this account, from prosecuting. 10. That the constables of the king's castles take cognisance of common pleas. 11. That the king's escheators oust men of lands held *in capite* by them and their ancestors from time immemorial, under pretence of an inquest of office, without summoning them before the king's court. Edward accepted all the articles unreservedly, except the second, which had reference to the new customs of 2s. on the tun of wine, 2s. on the piece of foreign cloth, and 3d. on the pound avoirdupois of other merchandise, originally conceded to Edward I. by the foreign merchants in 1303. As to this the king, at the request of the people, granted that the "little custom" should be taken off until it should appear whether any

(*n*) See Hallam, Mid. Ages, iii. 40.

advantage would accrue to him and his people thereby, and afterwards he would take counsel thereon. The "ancient prises and customs anciently due and approved" were not to be affected. In 1310 the "little custom" was again imposed, on the ground that no reduction in prices had followed the remission (*o*). In the following year the Ordainers declared it illegal.

Right of commons to concur in legislation.

The right of the commons to concur in legislation was affirmed in 1322, by the Act which repealed the Ordinances made by the Lords Ordainers in the fifth year of Edw. II. It was declared that "the matters which are to be established for the estate of our lord the king and his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in parliaments by our lord the king, and by the assent of prelates, earls, and barons, *and the commonalty* of the realm, according as it hath been heretofore accustomed" (*p*).

EDWARD III. 1327-1377.

Under Edward III. the barons, instead of opposing the king, rallied round the throne, and the commons, ceasing to be mere auxiliaries of the lords, became the chief asserters of constitutional rights against the arbitrary power of the crown. They did not, however, so much curb the royal power as consolidate their own. No reign, perhaps, is so replete with illegalities as [that of] Edward III.; but they were admitted to be exceptions, and disowned as precedents, while the legal rule was firmly established.

Regular meeting of parliament.

The regularity with which parliament was assembled by Edward III. confirmed the power of the commons, by affording them an opportunity for its frequent exercise. To defray the enormous expenses of his wars, the king was perpetually compelled to solicit the aid of his people, and during the fifty years of his reign, forty-eight sessions of parliament are recorded.

Annual parliaments.

It was, moreover, twice declared by statute (as it had been previously directed by the Lords Ordainers in 1311), that parliament should be held annually—by which appears to have been meant, not that there should be annual sessions of the same parliament, but a newly elected parlia-

(*o*) Parl. Writs, II. ii. 30.

(*p*) [Statutes of the Realm, 15 Edw. II., i. 189. Lords' Report, i. 282. Pike, Hist. H. of Lords, p. 318.—Ed.]

ment every year (*q*). Thus, in 1330, it was enacted: "A parliament shall be holden every year once, and more often if need be"; and again in 1362: "For redress of divers mischiefs and grievances which daily happen a parliament shall be holden every year, as another time was ordained by statute" (*r*).

The commons establish three great rights.

During the long reign of Edward III. (*s*), the commons succeeded in firmly establishing as essential principles of our government three great rights:

1. That all taxation without the consent of parliament is illegal.

2. The necessity for the concurrence of both Houses in legislation.

3. The right of the commons to inquire into and amend the abuses of the administration.

Growing out of these main rights, two derivative rights were also exercised by the commons for the first time: (*a*) The right to examine public accounts and appropriate the supplies, which was involved in Nos. 1 and 3; and (*b*) The right to impeach the king's ministers for misconduct, which was a corollary to No. 3.

(i) Taxation without consent illegal.

I. Ever since the enactment of the Confirmatio Cartarum, the illegality of levying aids or imposing talliages by the sole authority of the king, had been an admitted principle of the constitution. But both Edward I. and his son still continued occasionally to raise money in defiance of this statute, and Edward III. constantly levied arbitrary imposts of every kind. The commons, however, by their continual remonstrances, their conditional grants, and their liberal subsidies, whenever the king applied to them for

(*q*) See Stubbs, Const. Hist., iii. 393.

(*r*) 4 Edw. III. c. 14; 36 Edw. III., st. 1, c. 10. (Stat. of the Realm, i. 265, 374.) In the year 1328, no less than four parliaments were held; three in 1340; and two in one year were not infrequent towards the end of Edward III.'s reign and during the early years of his successor. Stubbs, Const. Hist., ii. 645.

(*s*) In the last year of Edward's reign, 1377, the Rolls of Parliament contain the first mention of a Speaker of the House of Commons, expressly named as such, "Monsieur Thomas de Hungerford, Chivaler, *Qi avoit les paroles* pur les Communes d'Engleterre en cest Parlement." (Rot. Parl., ii. 374.) Peter de la Mare, who was elected Speaker in Richard II.'s first parliament, had acted in that capacity, but without the name, in the Good Parliament of 1376.

aid, succeeded at length in establishing "the *practice* of what was before the *law*, the right of the people to tax themselves" (*t*).

In 1332 (6 Edward III.), a rebellion having broken out in Ireland, the king assigned certain commissioners to talliage the cities, towns, and royal demesnes throughout England; but finding it still necessary to apply to parliament he revoked these commissions, at the request of the prelates, earls, barons, and knights of the shire, and in consideration of the grant by the lords and commons of a subsidy, promised that in time to come he would not set such talliage, except as it had been done in the time of his ancestors, and as he might reasonably do (*u*).

In 1339 (13 Edward III.), the prelates, earls, and barons made a grant of one-tenth of their corn, fleece, and lambs, but only on the assurance of "some graces to the great and small of the kingdom," and with a stipulation that the "maltolt," or illegal custom on wool, should be abolished, and their present grant not drawn into precedent. The commons professed themselves most willing to grant a subsidy, but unable to do so without first consulting their constituents, for which purpose they desired that another parliament might be summoned. And they prayed that the sheriffs be directed that no knight of the shire be returned to the next parliament who is himself a sheriff or other official. They complained of the increased imposition on wool and lead, and boldly asserted that "inasmuch as it is enhanced without assent of the commons, or of the lords, as we understand," "any one of the commons may refuse it (le puisse arester) without being troubled on that account (saunz estre chalangee)" (*w*).

Four years later, in 1343 (17 Edward III.), the king being much pressed for money, assembled, with the concurrence of the lords, a council of merchants, and procured from them, without the assent of the commons, a grant of forty shillings on every sack of wool that should be exported. It seems to have been contended that this duty did not fall upon the people, but upon the foreign

(*t*) Lingard, Hist. Eng., iv. 127.
(*u*) Rot. Parl., ii. 66.
(*w*) *Ibid.* 104, 105; and see Hallam, Middle Ages, iii. 44.

purchaser; but the commons in their remonstrance showed that they possessed some rudimentary knowledge of the principles of political economy, alleging that the tax actually fell on the seller, the foreign merchants refusing to give the accustomed price on account of the additional duty.

In 1346 (20 Edward III.) parliament prayed the king that this forty shillings on the sack of wool might be taken off, but it was answered that the prelates and other magnates [grantz], seeing the necessity of the king, had assented, with the accord of the merchants, that he should have the said subsidy of wool for the prosecution of the war; and that as it had been pledged to his creditors it must continue; whereupon the commons gave way (*x*). In 1363, however, upon the petition of the commons, [no] grants of subsidies upon wool were [to be] made by merchants without the consent of parliament (*y*).

In 1348 (22 Edward III.), the commons made a conditional grant, and required the conditions—the most important being that the king should henceforth levy no "imposition, talliage, or charge by way of loan or in any other manner, without the grant and assent of the commons in parliament"—to be entered on the roll "as a matter of record, whereby they may have remedy if anything should be attempted to the contrary in time to come" (*z*). In these conditional grants originated the doctrine and practice that "supply should depend upon redress of grievances."

But while conceding the technical illegality of the proceeding, Edward seems always to have claimed a kind of moral right to impose charges upon his subjects in cases of great necessity, and for the defence of the kingdom. This was asserted even in his last parliament, in 1377 (*a*); and long previously, in 1339, with reference to the heavy impositions laid on the people on the occasion of the war with Scotland, the king had urged the same plea in a letter to the Archbishop of Canterbury: "That whereas the

(*x*) Rot. Parl., ii. p. 161.
(*y*) *Ibid.* p. 271.
(*z*) Rot. Parl., ii. p. 200.
(*a*) Rot. Parl., ii. 366.

people were burdened with divers charges, tallages, and impositions, which he could not mention but with much grief, yet being enforced by inevitable necessity, could not as yet ease the people of them, he required the archbishop to exhort the people patiently and humbly to bear the burden for a while, and to excuse him towards the people, hoping he should ere long recompense his said people and give them comfort in due time" (*b*).

Appropriation of supplies.

The first unequivocal instance of appropriation of supplies occurred in 1353, when a subsidy on wool was granted, to be applied solely for the purposes of the war (*c*).

Audit of public accounts.

In 1340 a parliamentary committee was appointed to examine into the accounts of the collectors of the last subsidy; and in the following year it was enacted, at the request of the commons, that commissioners should be assigned for a similar purpose (*d*). Enquiry into the accounts of the collectors was the first step towards examining into the application of the money by the king's ministers; but that some investigation of fiscal matters was absolutely necessary at this time, if only for the purpose of obtaining statistics, is evidenced by the ludicrous miscalculation made by the parliament in 1371 (45 Edward III.), as to the number of parishes in England. A subsidy was granted of £50,000, to be collected by an assessment of 22s. 3d. upon every parish, the number of parishes being assumed to be 45,000. After the parliament had been dismissed, it was discovered that the number of parishes was not much more than 8,600, and that the sum raised would not exceed £10,000. To repair the error the king summoned a Great Council, at Winchester, consisting of one selected member out of the two who had sat in the last parliament for each county, city, and borough. He excused himself for not summoning a full parliament on the ground of relieving his people from the additional expense (*e*); and the facts of the case having been laid

(*b*) See Broom, Const. Law, 271.

(*c*) Rot. Parl., ii. 252.

(*d*) *Ibid.* 130.

Payment to knights of the shire and burgesses.

(*e*) Both knights of the shire and burgesses were from the earliest time entitled to receive wages, or, more accurately, payment for expenses, from their constituents. The amount was fixed under Edward II., by the writs *de levandis expensis*, at 4s. a day for a knight and 2s. for a burgess. These

before the assembly they increased the parochial assessment, of their own authority, to 116s. (*f*). No complaint appears to have been made of this irregularity, by which the main intention of parliament was carried into effect. In the following year (1372) there occurred a more serious disregard of constitutional formalities, tending to destroy the unity of the House of Commons by reviving the former separation of the borough from the county members. After the petitions of the commons had been answered, the knights were dismissed; but the burgesses were convened before the Prince of Wales and the prelates and barons "in a chamber near the White Chamber," and induced, as a return for the continual safe convoy of merchant

writs, which were issued, after the dissolution of parliament, at the request of the members who had served, may be regularly traced to the end of Henry VIII.'s reign (Prynne's Fourth Register, p. 495). After that time payments still continued to be made voluntarily by some boroughs to their representatives. Andrew Marvell, the witty member for Hull in the reign of Charles II., has been erroneously reputed the last recipient of a salary. But in 1681, three years after Marvell's death, Thomas King, who had been member for Harwich, obtained from the lord chancellor, after notice to the corporation of Harwich, a writ *de expensis burgensium levandis*. In 1830, a proposal to restore the practice of paying wages to members was included by Lord Blandford in a Reform Bill which he submitted to the House of Commons (Hansard Deb., 2nd Ser. xxii. 678). Lord Campbell, in his life of Lord Chancellor Nottingham, after citing the case of Thomas King, gave it as his opinion that the writ might still be claimed, and that no new law is required for those who desire to resume the ancient practice. [See Anson, Law and Practice of the Constitution, vol. i. (1911), p. 129, note.]

Payment of members of parliament.

[Resolutions were passed in the commons, in 1893 and 1895, in favour of payment of members of parliament, but failed to find acceptance by the House of Lords. At last this was successfully effected in 1911, in an expeditious manner and by the House of Commons alone. On August 10 the chancellor of the exchequer brought in a motion that provision should be made for paying a salary of £400 a year to every member of the House except ministers and officers of it or of the royal household. He pointed out that the principle had been frequently affirmed by the House, and had been adopted by the prime minister before the previous general election. It was not an innovation, but a reintroduction of an early practice, which had been originally applied by the constituencies, latterly in surreptitious and indirect ways, till 1780, when, however, the principle of "reasonable wages for all members" was affirmed by a sub-committee. There was now a much greater demand on members' time. The proposal met with a good deal of opposition; but at the further debate on August 14, the motion was carried by 241 to 128.—Ed.]

(*f*) Rot. Parl., ii. 304.

shipping, to renew for a year a subsidy formerly granted upon imports (*g*).

(ii.) Legislation : concurrence of both Houses necessary.

II. The right of the commons to concur in legislation "according as it hath been heretofore accustomed," had been solemnly affirmed by parliament in the 5th of Edward II. (1322), and is moreover proved by the form of the enacting words of statutes, both prior and subsequent to that date. From the year 1318 down to the accession of Edward III. the form invariably runs: "by the assent of the prelates, earls, barons, and the commonalty of the realm." Under Edward III. this form alternates with another, in which the share of the commons is expressed as that of petitioners,—"at the request of the commons and by the assent of the prelates, earls, and barons." This was owing to the fact that at this time statutes were almost always founded upon the petitions of the commons, which expounded grievances and prayer for specific remedies (*h*). In 1340 (14 Edward III.) a joint committee of both Houses, consisting of the Archbishop of Canterbury and a certain number of bishops and barons (with whom were associated several of the justices), and twelve knights and six burgesses, was appointed to convert such petitions and answers as were fit to be perpetual into statutes (*i*). Matters of a temporary nature were usually regulated by ordinances, which differed little from statutes, except in their less solemn and less permanent

Difference between ordinances and statutes.

(*g*) *Ibid.* p. 310; and see Hallam, Middle Ages, iii. 47.

(*h*) Sometimes the commons merely prayed for a declaration of the existing law, in which case their assent to the declaration in answer was usually assumed without being positively given. This was the case with the great Statute of Treasons (25 Edw. III., st. 5, c. 2). The petition upon which this Act is founded simply prayed that "whereas the king's justices in different counties adjudge persons indicted before them to be traitors for sundry matters not known by the commons to be treason, it would please the king by his council, and by the great and wise men of the land, to declare what are treasons in this present parliament." The king's answer to this petition, entitled "A Declaration which Offences shall be adjudged Treason," constitutes the existing statute. It was a matter of the greatest constitutional importance that the law of treason should be fixed and invariable. In subsequent reigns the law of treason was frequently extended to offences not mentioned in this statute of Edward III.; but it was always a popular measure to reduce the crime to the limits of the ancient statute, which with some modifications, remains at the present day the law on the subject.

(*i*) Rot. Parl., ii. 113.

character, and in the fact that they were usually made, not in parliament, but in a Great Council. The Great Councils, however, sometimes contained all the elements of a parliament; the only difference being that the summonses were not in parliamentary form. But in ordinary cases the lords and the King's Council were the only members. Notwithstanding the tendency of ordinances to impair the legislative power of the Lower House, the dislike of the commons for innovations in the statute law made them partial to the former species of legislation. Thus, in 1363 (37 Edward III.), when it was proposed to enact the first sumptuary laws, the lords and commons were asked, "inasmuch as the matter agreed upon in parliament was novel and unheard of before," whether they would prefer an ordinance or a statute. They decided to proceed "by way of ordinance and not by statute, in order that, if anything should need amendment, it might be amended at the next parliament" (*k*). The important "Ordinances of the Staple," which, among other things, prohibited English merchants from exporting wool under pain of death, were promulgated in a Great Council held in 1353 (27 Edward III.), at which one knight from each shire, and certain citizens and burgesses attended. The introduction of a new capital offence was clearly a matter which required the sanction of a regularly constituted parliament. Conscious of the danger of departing from the legal form of the constitution, the commons present at the Great Council prayed "that the said articles might be recited at the next parliament and entered upon the parliament roll, for this cause that ordinances and agreements made in council are not of record, as if they had been made in a general parliament." In the next parliament the ordinances were expressly confirmed "to be holden for a statute to endure always," and it was enacted at the same time, that no alteration or addition should be made in future without the assent of parliament (*l*).

(*k*) Rot. Parl. ii. 280; and see Hallam, Middle Ages, iii. 49.

(*l*) Rot. Parl., ii. 253, 257; [and Taylor, Engl. Const., p. 496. As to the distinction between statute and ordinance *cf.* Gneist, Hist. Engl. Const., p. 374 and note.—Ed.]

(iii.) Right of Commons to enquire into administrative abuses.

III. On two occasions during the reign of Edward III., the commons interfered with great boldness in matters of governmental administration.

Attempt to establish the responsibility of ministers to parliament, 1342.

(1) In the parliament which met in April 1341 (15 Edward III.), they made, in conjunction with the lords, a praiseworthy but premature attempt to establish the responsibility of the king's ministers to parliament. Edward's quarrel with the archbishop, John Stratford, and the proceedings instituted against that prelate in the Exchequer, had raised the question of the right of peers to be tried by their peers in parliament, and a committee of the lords reported in the affirmative. When the question of supply came up, each of the three estates made a series of conditional demands, three of which are of special interest. (1) The lords required a statute enacting, in conformity with the recent report of their committee: That when the king was prosecutor ("où le roi se fait partie"), no peer of the land, whether minister or not, and whether on account of his office or for any other cause, should be brought to trial, lose his lands, tenements, goods or chattels, be arrested, imprisoned, outlawed or forfeited, or be bound to answer or be judged, except in full parliament and before the peers; saving unto the king the laws rightfully used by due process, and saving also suits between party and party (*m*). The lords and commons together petitioned: (2) That commissioners should be appointed to

(*m*) Rot. Parl., ii. 127. Anciently bishops would appear to have been regarded as peers; and the claim of Archbishop Stratford to be called upon to answer in parliament only, was admitted by the king. But bishops have long been held to be "lords of parliament" only and not "peers"; not being ennobled in blood, they are "not of trial by nobility," and would be tried for a capital offence by a jury of commoners. Lords' Standing Ord., No. 79, A.D. 1692; Trials of Bishop Fisher and Archb. Cranmer, 1 Howell, St. Tr., pp. 399, 771; May, Parl. Prac., (12th ed. 1917) pp. 6, 12, 592. ["It seems," writes Pike (Const. Hist. of House of Lords, p. 221), "to have been settled law that bishops do not enjoy the right of being tried by peers of the realm, either in parliament, or in the Court of the Lord High Steward," and cites especially Staunford, Les Plees del Coron., p. 153; 3 Inst. 30, in support of this statement. As regards the barons or peers for life, whose status as lords of parliament was especially determined by the Appellate Jurisdiction Act, 1887, sec. 2, it would appear certain that they, not being *ennobled in blood*, would be only triable before a common jury. The question of life peerages is discussed more fully *supra*, pp. 211-213. —ED.]

enquire into the accounts of such as had received the aids and other public moneys; and (3) That the ministers and judges should be appointed in parliament, and sworn to observe Magna Carta and the other statutes (*n*).

The most important of these demands, and at the same time the most obnoxious to the king, were the parliamentary appointment of the ministers and judges, and the auditing of accounts, which, combined, would at once have involved full ministerial responsibility. Finding, however, that a subsidy could only be obtained on condition that the petitions were granted, the king reluctantly allowed them to be embodied in a statute; but with a slight modification by which he was still to appoint, "with the advice of his *council*," the ministers and judges, who, however, should be bound to surrender their offices at the next parliament, and be there responsible to all having cause of complaint against them. The passing of this statute gave rise to the first protest on the rolls of parliament, the chancellor, treasurer, and judges recording their dissent. On the dissolution of parliament Edward had recourse to the violent measure of declaring this statute null and void, in a proclamation addressed to all the sheriffs. He was, however, conscious of the gross illegality of his conduct, and in the following parliament procured the formal repeal of the obnoxious Act (*o*).

First protest on the rolls of parliament against the passing of an Act.

(2) In 1376 (50 Edward III.) the commons for the first time exercised the constitutional right of impeachment (*p*).

First instance of parliamentary impeachment.

(*n*) Rot. Parl., ii. 131; and see Stubbs, Const. Hist., ii. 409.

(*o*) Rot. Parl., ii. 139; Rymer, ii. 1177; and see Hallam, Middle Ages, iii. 51.

(*p*) ["A second and higher judicial aspect still, in which the House of Lords appears, is that in which it stands out as a high criminal court of state for the trial of all persons who are impeached or accused by the commons, sitting as a grand jury of the whole nation, of the commission of high crimes and misdemeanours. The right to thus assail the great functionaries of the realm was one of the weapons won by the commons during their struggles for political power in the fourteenth and fifteenth centuries. The earlier instances of criminal proceedings which take place in parliament during the period which intervenes between the beginning of the reign of Edw. I. and the 50th year of Edw. III. are both irregular and ambiguous (*cf.* Stephen, Hist. of the Criminal Law, i. pp. 145-155). Not until the year last named do we find . . . a clear instance of a parliamentary impeachment in the sense in which that term is now understood. The proceedings

During the declining age of the king and the lingering illness of the Black Prince, John of Gaunt, Duke of Lancaster, had acquired the chief direction of affairs. His administration was exceedingly unpopular, and he appears to have been suspected by his dying brother of ambitious designs, inimical to the claims of young Richard of Bordeaux to succeed to the throne of his grandfather. The great increase in the power and influence of the House of Commons is remarkably brought out by the proceedings which took place in the "Good Parliament," as that which met in the 50th of Edward III. was long called among the people. Fifty years before, a combination of the barons against the Lancastrian party would doubtless have been the form which the opposition would have assumed. Now, the Prince of Wales and the Earl of March (the husband of Philippa, daughter and heiress of Lionel, Duke of Clarence) found that the best means of effecting their object was by backing up the Lower House in a political attack upon the government. The commons voted a subsidy, but insisted that the council should be strengthened by the addition of ten or twelve lords, prelates, and others, "to be constantly at hand so that no business of weight should be despatched without the assent and advice of all." After complaining, in general terms, that the king and kingdom had been greatly impoverished "for the private advantage of some near the king, and of others by their collusion," the commons proceeded to impeach, at the bar of the House of Lords, two peers, Latimer and Nevill, who held office under the king, and four commoners, Lyons, Ellys, Peachey, and Bury, farmers of the customs and of certain monopolies (*q*). The grounds of impeachment were

The Good Parliament.

Lords Latimer and Nevill impeached by the commons, 1376.

against the Lords Latimer and Nevill . . . are the earliest instance of a trial by the lords upon a definite accusation made by the commons."—Taylor, Engl. Const., 441; see also Gneist, Hist. Engl. Const., p. 371, note; Anson, Law and Custom of the Constitution, vol. i. (1911), pp. 362 *seq.*; Maitland, Const. Hist., pp. 317, 318.—Ed.]

(*q*) [In earlier times the Lords "claimed an original jurisdiction over crimes, without impeachment by the commons."—May, Parl. Practice, 12th ed. 1917, p. 55. This was probably done upon a private accusation, called "appeal." By "appeal," any private individual could arraign another before the high court of parliament. *Cf.* Rot. Parl., iii. 168; Taylor, Engl. Const., 442; and Pike, Const. Hist. House of Lords, p. 205.—Ed.]

various, but the three principal allegations against the accused were: (1) That they had procured and advised the removal of the Staple from Calais, where it had been fixed by parliament; (2) that they had lent money to the king at exorbitant usury; and (3) that they had purchased, at a low price, old debts due from the crown, and afterwards paid themselves in full out of the treasury. The House of Lords tried and convicted all the accused, with the exception of Bury, who did not appear to take his trial. Lord Latimer was expelled from the council for ever and placed under arrest; Lord Nevill was deprived of all his offices; while Lyons, Ellys, and Peachey were imprisoned and placed at the king's mercy (*r*). But the commons were not strong enough to stand alone. By the death of the Prince of Wales (June 8, 1376), they lost their chief supporter. On the dissolution of the "Good Parliament," the Duke of Lancaster resumed the chief place in the administration; the new council of twelve was removed; the former partisans of the duke returned to court; and Sir Peter de la Mare (steward to the Earl of March), who had led the opposition in the House of Commons, was arrested under false pretences, and imprisoned in Nottingham Castle. In the following year a parliament, packed with the duke's supporters, illegally returned by the sheriffs at his request (*s*), undid the work of its predecessors, and reversed the judgments given against the impeached ministers. No testimony to the real advance in the power and importance of the lower House can be stronger than this subversion of the measures of one House of Commons by another specially packed for the purpose.

A packed House of Commons.

The intervention of the commons was not confined to questions of internal administration. Under Edward III. we find them constantly consulted and giving advice on questions of war and peace. Hallam calls this an "unfair trick of his policy" in order to prevent any murmuring about subsidies required to maintain wars undertaken by

The commons intervene in questions of war and peace.

(*r*) Rot. Parl., ii. 323-329.

(*s*) Lingard, Hist. Eng., iv. 104. Not more than seven of the knights who had sat in the "Good Parliament" were returned to this one.—See the writs in Prynne's Fourth Register, 302, 311.

common assent (*t*). But we have seen that the consideration of questions of this nature was an ancient right of the national council (*u*), a body with which the commons had now been long permanently incorporated; and it has been fairly contended that they voluntarily sought the exercise of this power, accepted the attendant responsibility, and gained greatly by so doing (*w*).

In 1328, while Edward was still a minor, and Mortimer held the reins of power, the treaty of peace with Scotland, by which that kingdom was liberated from all feudal subordination to England, was concluded with the consent of parliament, the commons being expressly mentioned.

In 1331, the king consulted parliament on the question of peace or war with France, and was advised in favour of peace.

Five years later, however, in 1336, we find them urging the king to war with Scotland, on the ground that "the king could no longer, with honour, put up with the wrongs and injuries daily done to him and his subjects by the Scots" (*x*).

Again, in 1341, in the first flush of Edward's French victories, the parliament pressed him to continue the war, and voted large subsidies for that purpose.

In 1343 parliament was asked to advise the king as to making peace with France. The lord chamberlain, Sir Bartholomew de Burghersh, announced on the part of the king that "as the war was begun by the common advice of the prelates, great men, and commons, the king could not treat of, or make, peace without the like assent." The lords and commons, after separate deliberation, gave their opinion that the king ought to make peace if he could obtain a truce that would be honourable and advantageous to himself and his friends, but if not, the commons declared that they would aid and maintain his quarrel with all their power (*y*).

(*t*) Middle Ages, iii. 53.
(*u*) *Supra*, p. 242.
(*w*) Guizot, Hist. du Gouv. Rep., vol. ii.; Green, Hist. of the English People, 1878, i. p. 413, *sub* Edw. III.
(*x*) Parl. Hist., i. 93.
(*y*) *Ibid.*, ii. 106.

In 1344 parliament, on being consulted, again urged that the war should be prosecuted energetically; but in 1348, when asked for advice (the expenses of the war having in the meantime proved exceedingly burthensome), the commons returned a very discreet and guarded answer. "Most dread lord," they said, "as to your war and the array thereof, we are so ignorant and simple that we cannot give you advice. We therefore pray your gracious lordship to excuse us, and that it please you, with the advice of the great men and of the sages of your council, to ordain what shall in this matter seem best to you for the honour and profit of yourself and your kingdom; and whatever shall be thus ordained by the consent and agreement of you and of the great men aforesaid, we readily assent to, and will hold it firm and established" (*z*).

In 1354, the king informed the parliament, through the lord chamberlain, that there was great hope of bringing about a peace with France, but that as he would not conclude anything without the assent of the lords and commons, he wished to know whether they would agree to peace if it might be had by treaty. To this the commons at first replied "that whatever should be agreeable to the king and the lords in making of this treaty, would be so to them"; but on being asked again, "If they consented to a treaty of perpetual peace if it might be had?" they all with one voice cried out, "Aye! Aye!" (*a*).

When at length peace was concluded in 1360 by the Treaty of Brétigni, parliament was summoned, and the treaty submitted to its inspection and formally approved.

In 1368, when David Bruce offered peace with Scotland on condition of being relieved from all homage for his crown to the king of England, the parliament, on being consulted, advised the king "not to hearken to any such propositions," seeing that "they could not assent to any such peace, upon any account, without a disherison of the king, his heirs, and crown, which they themselves were sworn to preserve" (*b*).

(*z*) Rot. Parl., ii. 165.
(*a*) Rot. Parl., ii. 262.
(*b*) Parl. Hist., i. 131.

Once again, in 1369, the king consulted parliament as to whether he should renew the war with France, because the conditions of the last treaty had not been observed, and the parliament advised him to do so (*c*).

These examples show the settled practice during the reign of Edward III., and from that time questions of war and peace have been admitted, both by the sovereigns who have requested, and by the parliaments which have freely offered, counsel and advice, to be proper subjects of parliamentary cognisance. "The exercise of this right," it has been well observed, "so far from being a modern invasion of the royal prerogative, is an ancient constitutional usage. It was not, however, until the power of Parliament had prevailed over prerogative that it had the means of enforcing its advice" (*d*).

Control of the commons over various affairs of state.

In many other matters, besides those already enumerated, the commons, under Edward III., exercised an active control over state affairs. The statute of Provisors (25 Edw. III.)—which checked the power assumed by the pope of nominating foreign clerks to fill the ecclesiastical benefices and dignities of England—was passed in consequence of "the grievous complaints of all the commons of the realm." In this reign also we meet with the first efforts to repress electoral abuses. In addition to several petitions that none but knights of reputable esquires might be allowed to serve as county members, it was enacted in 1372 (46 Edw. III.) that no lawyer practising in the king's court, nor sheriff during his shrievalty, should be returned or accepted as knight of the shire. The reason alleged was that many lawyers had procured seats in parliament for the purpose of putting forward, in the name of the commons, petitions which only concerned their private clients; and that sheriffs, being common ministers for the people, ought to reside in their official districts to administer right to all (*e*).

"The result of the century of the three Edwards lies in the more distinct limitation of the functions and powers

(*c*) See Guizot, Hist. du Gouv. Rep., vol. ii.

(*d*) May, Const. Hist., ii. 86. For instances of parliament being consulted as to peace or war under Henry VII., James I., and Queen Anne, see Parl. Hist., i. 452; i. 1293; v. 609.

(*e*) Rot. Parl., ii. 310. Though long obsolete, this statute was not formally repealed till 1871.

both of church and state, in political government and assembly of the realm, in parliament and convocation, in legislation and the administration of justice; yet more especially in the firm establishment of the rights of parliament in all their three directions" (*f*).

RICHARD II. 1377-1399. Constitutional importance of his reign.

The reign of Richard II. is perhaps the most interesting period in the early constitutional history of England. It was the turning-point in the long struggle between constitutional liberty and that arbitrary power towards which the loosely-defined prerogatives of our early kings were always impelling them. During the last two years of his reign Richard succeeded in establishing a practical despotism, and the question between him and his people was narrowed to the simple issue of absolute monarchy against parliamentary government. His deposition and the election of the worthiest member of the royal house to fill his place marked the final triumph of constitutional principles, and furnished a precedent of the greatest value when, nearly three hundred years later, the last of the Stuart kings attempted once more to make "the royal will the only law." It was in the reign of Richard II., moreover, that the formidable insurrection of 1381 proved the turning-point in the history of villeinage, which thenceforth gradually declined until it died out without any legislative abolition; and in this reign also we recognise in the theological writings of Wycliffe "the true epoch of the beginning of the English Reformation" (*g*).

Under Richard II. not only did the commons confirm by frequent exercise the three main rights established under Edward III., that (1) no money could be levied or (2) laws enacted without their assent, and that (3) the administration of government was subject to their inspection and control: but they also secured on an equally firm basis the two derivative rights which had been asserted for the first time in the late king's reign—namely, (1) the right to examine the public accounts and appropriate the supplies, and (2) the right to impeach the king's ministers for misconduct.

(*f*) Gneist, Hist. of English Constitution, p. 410.
(*g*) Shirley, Fasciculi Zizaniorum.

The three periods of the reign of Richard II.

In taking a rapid survey of the principal constitutional events of the twenty-two years of Richard's reign, it will be convenient to divide it into three periods: I. From 1377 to the *coup d'état* of 1389, when the king suddenly declared himself of age and took the reins of government into his own hands. II. From 1389 to the second *coup d'état* of 1397, when the king seized the Duke of Gloucester and the Earls of Warwick and Arundel (three of the five "lords appellant") and executed his long dissimulated project of revenge. III. From 1397, when the king began to exercise despotic power, until his deposition in 1399.

First period, 1377-1389.

1. 1377—1389. During this period of minority the commons, no longer content with a defensive warfare against the crown in order to protect the rights already acquired, assumed an aggressive character, and for some years "the whole executive government was transferred to the two Houses" (*h*).

Great increase in power of the commons.

Council of twelve.

As soon as the coronation of the boy-king was over, the prelates and barons held a great council, and chose, "in aid of the chancellor and treasurer," twelve councillors to act as a quasi-regency. About three months afterwards a parliament was summoned, and the House of Commons, to which had been returned a large proportion of the knights who sat in the "Good Parliament" which impeached the Lancastrian ministry, elected as their speaker Sir Peter de la Mare, now released from prison. The commons at once proceeded to assert their right to a voice in the government; and at their request, the lords, in the king's name, appointed a permanent council of nine, without whose unanimous consent no business of importance was to be transacted. They also petitioned that, during the king's minority, the chancellor, treasurer, judges, and other high officers, should be made in parliament; and procured the appointment of two London merchants, William Walworth and John Philypot (the latter of whom is celebrated as the first Englishman who has left behind him the reputation of a financier), as sworn parliamentary treasurers to receive and disburse the liberal subsidy granted for the French war (*i*).

Permanent executive council of nine.

(*h*) Hallam, Middle Ages, iii. 59.
(*i*) Rot. Parl., iii. 5-7.

Right of commons to examine public accounts and appropriate the supplies established.

The heavy expenses attending the prosecution of this war—a legacy which Richard had inherited from his grandfather—and the usual want of economy incident to a minority, necessitated frequent and urgent appeals to parliament, and the commons were always careful to tack conditions to their grants. In the next parliament they required a clear account in writing of the receipt and expenditure of the last subsidy, a request which was reluctantly granted. In the second year of Richard's reign, the kingdom was in imminent danger of invasion. The Privy Council, not wishing to call a parliament so soon after the dissolution of the last, convoked a Great Council of peers and other great men, who, finding the absolute necessity of preparation for defence, and that the king wanted money for that purpose, declared that they could not provide a remedy without charging the commons of the realm, which could not be done without parliament; but as the necessity was very urgent, all the lords there present voluntarily lent divers large sums of their own money, as did also "the good men of London and many other towns, and several persons in the kingdom to whom the king applied with the assent of the said Great Council." The lords then strongly advised that a parliament should be presently summoned, as well for the repayment of their loan as for further supply (*k*). This advice was acted upon, and it is significant of the real progress made that, as soon as parliament met, the king voluntarily, without waiting for a petition, informed the commons that the treasurers were ready to exhibit the accounts before them; and a committee was appointed to enquire generally into the state of the revenue. A similar committee, but with more extended powers, was appointed in the following year (3 Ric. II.); and the right of the commons to investigate the accounts and appropriate the supplies was clearly established (*l*).

Bold language of the commons

In the parliament which met after the insurrection of the villeins in 1381 (5 Ric. II.), the language of the

(*k*) Rot. Parl. (2 Ric. II., Nos. 3, 4, and 5), iii. 55.

(*l*) After the reign of Hen. IV. this right fell into disuse. It was revived in 1624 and 1641, and again firmly established as an undisputed principle under Charles II. in 1666.—Hallam, Const. Hist., ii. 356.

commons was characterised by a remarkable boldness. After expressing their conviction that, "unless the governance of the realm were speedily amended, the realm itself would be utterly lost and ruined for ever, and, as a consequence, our lord the king, and all the lords and commons, which, in His mercy, God forbid," they assert "that there are such defects in the said governance, as well about the king's person and in his household (through the outrageous number of his familiars established there) as in his courts of justice; and by grievous oppression in the country through the outrageous multitude of embracers and maintainers of suits, who are, as it were, kings in the country; that neither right nor law is done to any, and the poor commons are from time to time so pillaged and ruined, partly by the king's purveyors of the household and others, who pay nothing to the same commons for the victuals and carriage which they take, partly by the subsidies and talliages raised upon them, and besides by the grievous and outrageous oppressions of the servants of the king and other lords, and especially by the aforesaid maintainers of suits, that they are reduced to greater poverty and discomfort than ever they were before." After making many other bitter complaints against the administration, they emphatically conclude: "And for God's sake let it not be forgotten that there be put about the person of the king, for and of his council, the most sufficient and discreet knights and lords that man can have or find in the kingdom." A Commission of Reform was appointed "to survey and examine in privy council both the state and government of the king's person and of his household, and to suggest proper remedies." And it was said (continues the entry on the roll) by the lords in parliament that, "as it seemed to them, if amendment of government were to take place throughout the kingdom, it should begin by the chief member, which is the king himself, and so from person to person, as well of Holy Church as others, and from place to place, from higher to lower, sparing no person, degree, or place" (*m*). The lords and commons seem to have vied with each other in boldness and plainness of speech. It was

Bold language of the lords.

Unanimity of the two Houses.

(*m*) Rot. Parl., iii. 100.

in a great measure owing to this unanimity between the two Houses, and to the support thus afforded to the commons in their struggle with the crown, that the early triumph of constitutional principles was obtained (*n*). It was only

(*n*) "Few things in our parliamentary history are more remarkable than the way in which the two Houses have for the most part worked together" in times when they "were really co-ordinate powers in the state. During the six hundred years that the two Houses have lived side by side, serious disputes between them have been very rare, and those disputes which have happened have generally had to do with matters of form and privilege which were chiefly interesting to members of the two Houses themselves, not with questions which had any great importance for the nation at large." —Freeman, Growth of Eng. Const., 99. In recent times, however, differences between the two Houses have become more common. "The Lords," remarks May, "opposed themselves to concessions to the Roman Catholics, and to amendments of the criminal law, which had been approved by the commons. For several years neither the commons nor the people were sufficiently earnest to enforce the adoption of those measures; but when public opinion could no longer be resisted, the lords avoided a collision with the commons by acquiescing in measures of which they still disapproved. Since popular opinion has been more independently expressed by the commons, the hazard of such collisions has been greatly increased. The commons, deriving their authority direct from the people, have increased in power: and the influences which formerly tended to bring them into harmony with the lords have been impaired."—May, Const. Hist., i. 307. ["A collision between the two Houses was narrowly avoided in 1884, when the Representation of the People Bill was rejected by the House of Lords. A new departure at that crisis was taken by a correspondence carried on between the Marquis of Salisbury, as representing the opposition and the Conservative majority in the House of Lords, and the Right Hon. W. E. Gladstone, the then Prime Minister, through the medium of the sovereign. This was one of the rare instances in later English history of the sovereign stepping into the arena of party politics, in order to stay a political and, it might be, a constitutional crisis of threatening dimensions. That a collision between the two Houses was not precipitated at this juncture was primarily due to the good services of the sovereign in accepting the position of mediator between the two rival political forces, and, next, to the patriotic disposition shown by either statesman, who, while each asserting their own standpoint, finally made those mutual concessions, which harmonised in the main with the prevailing popular opinion." A more recent instance of pourparlers between the two Houses is afforded by the conference, in the summer of 1910, between four cabinet and four ex-cabinet Ministers, representing the government and the opposition, the House of Lords and the House of Commons respectively. The demise of the crown in the person of King Edward VII. found the two Houses in direct conflict, in consequence of the rejection by the House of Lords of a complex financial bill sent up by the commons, and by which action the commons considered their exclusive rights to control finance infringed. Probably in order that the new reign should commence under calm conditions, a conference was arranged by the parliamentary leaders on either side: viz., the prime minister (Mr. Asquith) and Lord Lansdowne. The result of the conference, which did not, as in the previous case, invite the

when, later on, the baronage had split up into rival factions, that Richard was enabled to get rid of the chiefs of the opposition, and to secure an obsequious lower House.

As the king grew up towards manhood, he began to exercise the prerogative of appointing his own ministers, and, unfortunately for himself, developed the same partiality for favourites which had proved so disastrous to Edward II. This led to the proceedings of the tenth year of his reign, which mark an important epoch in parliamentary history. The abuses of administration, unchecked by the remonstrances of parliament, or even by statutory enactments (*o*), at length became so grave, that the commons determined to remove the ministry and to impeach its chief, the chancellor, Michael de la Pole, Earl of Suffolk. This prosecution confirmed to the commons their newly-acquired right of impeaching the ministers of the crown. In the parliament which met on October 1, 1386, the lower House, instead of taking into consideration the question of supply, at once expressed, in the presence of the king, their resolution to impeach the chancellor. The king then withdrew to Eltham, and when both Houses jointly requested the removal of the chancellor, the king, with characteristic impetuosity and arrogance, replied "that he would not for them, or at their instance, remove the meanest scullion from his kitchen." The lords and commons returned a joint answer, refusing to proceed with any business until the king should come back to his parliament and remove the obnoxious minister from office (*p*). At length Richard was rash enough to threaten

Proceedings of parliament in 1386.

Impeachment of Michael de la Pole.

intermediary of the crown, was conducted with good feeling on either side, but the attempt to achieve a *modus vivendi* failed; and, although the reasons for the want of unanimity have not been and possibly never will be revealed, it is not impossible that in times to come a more extended use may be made of mutual exchange of opinion between the Houses on vexed subjects, culminating, perhaps, in the appointment of a joint committee of both Houses to deliberate on constitutional matters of grave importance. The failure of this conference was followed by a dissolution of parliament, and the Parliament Act, having for its object the restriction of the powers of the House of Lords to negative bills sent up by the commons, was passed in 1911. *See infra*, chap. xviii., *in fin.*—Ed.]

(*o*) "'Sed quid juvant statuta?' says Walsingham, "since the king with his privy council is wont to alter or abolish what in parliament the whole commonalty and the baronage have just enacted."—Walsing., ii. 48.

(*p*) Knyghton, in Decem. Script., col. 2680; Hallam, Midd. Ages, iii. 67.

to call in the advice of the king of France; a threat which produced the memorable address in answer, in which the parliament referred to the deposition of Edward II., and plainly intimated to the king that his continued contumacy would produce a similar result (*q*). After this Richard yielded: the chancellor was removed, and his enemy Arundel, bishop of Ely, appointed in his stead. In a bill of impeachment, divided into seven heads, Suffolk was charged with divers crimes and misdemeanours, and especially with having obtained from the king grants beyond his deserts and contrary to his oath of office, and with having enriched himself by defrauding the crown. He made a very able defence and was acquitted on some of the charges; but being found guilty on the rest was condemned to forfeit all his grants, and to be committed to prison during the king's pleasure (*r*).

Commission of Reform.

Acting on the precedents of the reigns of John, Henry III., and Edward II., and of the third and fifth years of the king's own reign, the commons now petitioned for the appointment of a Commission of Reform. The king at first resolutely refused to give his assent, and threatened to dissolve parliament, when the commons, to terrify him, sent for the statute by which Edward II. had been deposed (*s*). At length the king consented, and a commission, consisting of fourteen persons of the highest

(*q*) Their words were: "We have an ancient statute, and it was not many years ago experimented (it grieves us that we must mention it) that if the king through any evil design or foolish obstinacy, or contempt, or out of a perverse or froward wilfulness, or by any other irregular courses, shall alienate himself from his people, and refuse to govern by the laws, statutes, and laudable ordinances of the realm, with the salutary counsel of the lords and great men of the realm, but will throw himself headlong into wild designs, and wantonly exercise his own singular arbitrary will,—from that time it shall be lawful for his people, by their full and free assent and consent, to depose the king himself from his royal throne, and in his stead to raise up some other of the royal race upon the same."—Knyghton, col. 2683; Parl. Hist., i. 186. There was, of course, no general "statute" authorising the deposition of kings. The reference was to the statute deposing King Edward II.

(*r*) Rot. Parl., iii. 216-220. There is reason to believe that Suffolk was as much "sinned against as sinning." As a *parvenu* he was regarded with enmity and jealousy by the old nobility, headed by the king's uncle, the Duke of Gloucester. See Taswell-Langmead, Reign of Richard II.

(*s*) Rot. Parl., iii. 233.

eminence, was appointed by statute, with almost unlimited powers, for the space of one year (*t*).

Richard, who was now in his twentieth year, had no intention of submitting to the loss of power. Before the dissolution of parliament he had made a verbal protestation that nothing done therein should be in prejudice of his prerogatives (*u*); and a few months afterwards, having in the meantime released Suffolk and restored him to favour, he summoned the judges to Nottingham, and propounded to them the famous set of questions. The judges gave their answers in writing under seal: (1) That the late statute, ordinance, and commission were derogatory to the king's prerogatives; (2) that all who procured the said statute, ordinance, and commission to be passed, or persuaded or compelled the king to consent to it, were deserving of the punishment of death; (3) that the king, and not the lords and commons, had the power to determine the order in which business should be proceeded upon in parliament (*w*); (4) that the king could dissolve parliament at pleasure; (5) that his ministers could not be impeached without his consent; (6) that any member of parliament contravening articles 3, 4, and 5 should be punished as a traitor, and especially he who had moved that the statute deposing Edward II. should be sent for, and he who had brought it in; and (7) that the judgment against the Earl of Suffolk was altogether erroneous, and might be revoked (*x*). All the judges, except one, subsequently protested that these answers had been extorted by threats.

Answers of the judges to Richard's questions.

(*t*) "Even impartial men," Hallam remarks, "are struck at first sight by a measure that seems to overset the natural balance of our constitution. But it would be unfair to blame either those concerned in this Commission, some of whose names at least have been handed down with unquestioned respect, or those high-spirited representatives of the people whose patriot firmness has been hitherto commanding all our sympathy and gratitude, unless we could distinctly pronounce by what gentler means they could restrain the excesses of government. . . . No voice of his people, until it spoke in thunder, would stop an intoxicated boy in the wasteful career of dissipation. . . . Nothing less than an extraordinary remedy could preserve the still unstable liberties of England."—Middle Ages, iii. 69, 70.

(*u*) Rot. Parl., iii. 224.

(*w*) This was directed against the contention of the commons, insisted upon in the case of Suffolk's dismissal, that redress of grievances ought to precede supply.

(*x*) Rot. Parl., iii. 233; and see Hallam, Middle Ages, iii. 72.

Whatever may have been the motive which dictated them, they were undoubtedly both servile and sanguinary, unconstitutional for the most part, even as the constitution was then understood, and utterly inconsistent with the continued existence and future development of parliamentary liberty.

Plot of the king against parliament.

The king had been secretly maturing a plot for working out his revenge through the medium of a corrupt bench of judges and a packed House of Commons. He had intended, after securing a parliament favourable to his cause (*y*), to seize the most obnoxious members of the opposition, and send them for trial before the judges who had already given their opinion on the question of law. The discovery of this plot led to the subsequent revolutionary proceedings of the five "lords appellant" (Gloucester, Derby, Nottingham, Warwick, and Arundel) in the parliament which with equal propriety has been termed the "Wonder-working" and the "Merciless." Deprived, by death or exile, of all his favourites, Richard remained for nearly a year subservient to the Duke of Gloucester's party; until, taking advantage of the growing disunion in their ranks, and of a reaction in public opinion, he suddenly (in 1389) snatched the helm of government from their grasp.

Revolutionary proceedings of the lords appellant.

Insurrection of the villeins, 1381.

The formidable insurrection of the villeins in 1381 had very forcibly called the attention of the knights and burgesses, who had hitherto been intent upon the maintenance of their own political liberties, to the growing feeling of discontent among the agricultural labourers. Forming probably a majority of the whole nation, they were not destitute of political privileges, but harassed by vexatious restrictions on the freedom of their labour, and in many cases were in a state of personal bondage.

History of villeinage.

For a long time prior to the conquest, the condition of a large number of the ceorls had been gradually becoming more and more depressed. Although they were all freemen, an increasing number had lost the privilege of

(*y*) He sent for the sheriffs and required them to permit no knight or burgess to be elected without the approbation of the king and his council. The sheriffs refused, asserting that the commons would maintain their ancient privilege of electing their own representatives. Vita Ricardi, p. 85; Wals., ii. 161.

commending themselves to whatever hlaford they pleased, and were unable to quit the soil which they cultivated for their own and their lord's benefit. There is no evidence that the Normans made any change in the legal position of this class of the people. On the contrary, the customary rights of the agricultural tenants—the main body of the people—are expressly confirmed in the laws attributed to William the Conqueror: "Coloni et terrarum exercitores non vexentur ultra debitum et statutum, nec licet dominis removere colonos a terris dummodo debita servitia persolvant" (*z*). But the general status of all agricultural tenants would naturally be lowered under the harsh rule of their new military masters. The multitude of smaller or larger "manors" with which the whole of England appears covered in the first century after the conquest, were not indeed of Norman origin, though called by a Norman name; but the strict application of the feudal system to all kinds of land, which was a result of the conquest, must have tended very much to throw the small landed proprietors under manorial lordships (*a*). The ceorl, who had previously been at liberty to go where he willed, would now tend to the position of one bound to the soil; and the service which was formerly certain in amount would now in many cases be exacted at the will of the lord. But the ceorl did not on that account cease to be a freeman. Ceorls who had land for the most part retained it, as *libere tenentes* or *socmanni*, rendering by way of rent, fixed agricultural services, exclusive of, or in conjunction with, a money payment. The rest, under the generic term *villani*, were the agricultural labourers whose wages were paid in land carved out of the demesne which they cultivated for the lord. But amongst the villeins there were various grades, of which the higher, possessing larger holdings, and performing the more honourable services of agriculture, probably approached very near to the *socmanni;* while the lower, such as the *bordarii*, *cottarii*, and *cotseti*, with but scanty allotments, and rendering a baser and less skilled labour, would be liable in many cases to become gradually

(*z*) Thorpe, Ang.-Sax. Laws, 481, c. 1; Leg. Gul. Conq., c. 29.
(*a*) Bracton, lib. i. c. 11, fol. 7.

confounded with the *servi*, who, after the date of Domesday, disappear as a class distinct from the *villani* (*b*).

Status of the villeins.

Glanvill, writing in the reign of Henry II., speaks of the *nativi* as being absolutely dependent upon their lords' will, and so destitute of any kind of property that they were legally incapable of purchasing their own redemption from villeinage (*c*). Here we may probably trace the influence of the Roman law as to slavery (*d*), in exaggerating the servile aspect of villeinage in the eyes of the mediæval lawyers. Applied to the lower grade of villeins—the representatives of the ancient theows, the *servi* of Domesday—this description is doubtless quite accurate; but with regard to the whole class of agricultural labourers, generically known as villeins, it is inconsistent with what we learn from other historic sources. That villeins had property, notwithstanding the general statements of Bracton and other legal writers to the contrary, seems to be clearly proved. Thus, in the chronicle of Simeon of Durham, we read (*s. a.* 1096): "Comites, barones, vicecomites suos milites et villanos spoliaverunt, et regi non modicam summam auri et argenti detulerunt" (*e*). So in the "Dialogus de Scaccario," among possible debtors to the king are enumerated *miles, vel liber alius, vel ascriptitius* (*f*). In Magna Carta (sec. 20), the "wainage" (implements of tillage) of a villein are specially excepted from liability to seizure for a fine due to the king. Henry III., in a writ issued in 1225 for the collection of a "fifteenth," excepts from assessment the arms which a villein was sworn to keep for service in the local militia, as well as his household utensils, and such of his provisions, hay, and provender as were not for sale (*g*). In 1232 a

(*b*) [*Cf.* Gneist, Hist. Engl. Const., p. 441.—Ed.]

(*c*) Glanvill, lib. v. c. 5; see also Dialog. de Scac., lib. 1 c. 11; lib. ii. c. 14.

(*d*) *Cf.* Inst. II., ix. 3.

(*e*) Sim. Dunelm., ii. 227.

(*f*) Dial. de Scac., lib. ii. c. 13. The "Dialogus de Scaccario" was written by Richard, Bishop of London, Treasurer of the Exchequer under Henry II., son of Nigel, Bishop of Ely, his predecessor in the office, and great-nephew of Bishop Roger of Salisbury, the original organiser of the administration of that court. It contains "an extraordinary mass of information on every point in the development of constitutional principles, before the Great Charter."—See Stubbs, Select Chart., 160.

(*g*) Rymer, i. 177.

"fortieth" is declared to have been granted by the "archbishops, bishops, abbots, priors, clergy holding lay fees, earls, barons, freeholders, and *villeins*" (*h*). Five years later a "thirtieth" is declared to be granted by the freeholders, *pro se et suis villanis* and a distinction is drawn between the villeins, and the poor having less than forty pence, *in bonis*, who are to pay nothing (*i*).

Change in meaning of the word "villein."

It seems clear that the word *villanus* had undergone a change of meaning between the times when Domesday was compiled and when Bracton wrote under Henry III. In Domesday the men who, though performing base services, were still free, are carefully distinguished from the *servi*. But both the *villani* and *servi* received, the one their wages, the other their means of subsistence, in land, which, however it might differ in quantity, was still held by the same villein tenure, and for which they rendered services the same in kind though differing in extent. From the status of the *servi*—the lowest species of tenants-in-villeinage—the generic term "villein" seems gradually to have acquired a lower sense and meaning, and came at length to denote the condition of personal servitude (*k*). The great mass of the villeins, however, were still freemen, though subject to services of a base or servile character. The word *servus* disappeared as the name of a class, but villeins, in the lower sense of the term, are generally specifically described as *nativi*—villeins by birth, not merely by tenure or by the addition of the word *servus* after *villanus*. The double signification of the word is evident from the returns in the Hundred Rolls (*temp.* Edw. I.), where, in certain cases, it is specially stated, *villani sunt servi*, or

(*h*) Matt. Paris, 380; Select Chart., 351.

(*i*) Rymer, i. 232.

(*k*) "It may be doubted whether the word *villani* had during the twelfth century fully acquired the meaning of servitude which was attached to it by the later lawyers."—Stubbs, Const. Hist., i. 467. ["For some purposes, indeed—chiefly in connection with the law as to wrongs—the distinction between free and slave was clearly drawn in the law books. But for many purposes the distinction was not very apparent. In Domesday Book 'the *serrus* who has land and oxen may be casually called a *villanus*, and we cannot be sure that no one whom our record calls a *servus* has the wergild of a free man'"; W. S. Holdsworth, A History of English Law (vol. ii. (1909), p. 33); see also Maitland, Domesday Book and Beyond, pp. 30-33; and Vinogradoff, English Society, pp. 217, 218.—Ed.]

nativi (*l*), while, on the other hand, in the decisions of the Curia Regis of the same period, the word *villanus* is used to designate the state of personal serfdom (*m*). We are expressly told by Bracton (*temp.* Hen. III.) that a freeman might hold tenement in villeinage, in which case his personal liberty existed along with the burthens of territorial servitude (*n*). He distinguishes two kinds of villeinage, socage and pure. The *villani socmanni* were bound to fixed services, but while they could not, so long as they performed the service due, be removed from their land against their will, they could at any time voluntarily leave it. They had no power, however, any more than the tenant in pure villeinage, to confer on another any right or interest in the land occupied; they could only by a bargain with the lord surrender it to him or his steward, so that it might be let out afresh to the person in whose favour it had been relinquished (*o*). The "pure" villein, on the contrary, according to Bracton, might be subjected to unlimited services and burthens, "nec scire debeat sero quid facere debeat in crastino, . . . talliari . . . potest . . . ad plus vel minus." He had not the smallest right in the land which he cultivated, and was in the strongest sense of the word a predial serf. The *villani socmanni* seem to have consisted chiefly of those who were "tenants of the king's demesnes," but there is very strong evidence that at the beginning of the thirteenth century the majority of the agricultural tenants of ordinary manors, though subject to many vexatious conditions, were freemen, and that only those specially denominated *nativi* were "pure" villeins — that is, in actual serfdom or slavery (*p*).

Villein-sokemen and pure villeins.

(*l*) Rot. Hund., 324, 327, 329, 822.

(*m*) Placit. Abbrev. pp. 25, 161.

(*n*) Bracton, l. ii. c. 8; iv. c. 28; see also Placit. Abbrev., 29 Edw. III. p. 243.

(*o*) Bracton, ii. 8.

(*p*) See especially "Domesday of St. Paul's," of the year 1222, edited for the Camden Society by Archdeacon Hale. "Tenants of four ranks or orders," remarks the Archdeacon, "occupied the manors of St. Paul's at the time of the Exchequer (Domesday) Survey—Villani, Bordarii, Cotarii, Servi. . . . In the Domesday of 1222 only one of these distinctive names is preserved—that of Cotarii; but the other three classes appear to be represented by the Tenentes ['libere,' 'antiquum tenementum,' 'de dominico,' 'per villenagium,' &c.], the Operarii [persons holding land 'ad operationem,'

Difference between the ancient manor and the modern landed estate.

It is important to bear in mind that manorial property differed in many respects from the modern landed estate. "It was not a breadth of land, which the lord might cultivate or not as he pleased, suffer it to be inhabited, or reduce it to solitude and waste; but it was a dominion or empire, within which the lord was superior over subjects of different ranks, *his power over them not being absolute, but limited by law and custom.* . . . The demesne, the assised (*q*), and the waste lands were his: but the usufruct of the assised land belonged, on conditions, to the tenants, and the waste lands were not so entirely his that he could exclude the tenants from the use of them" (*r*).

Tendency in the manor towards certainty of tenure and services.

The natural tendency of the customary law by which each manor was regulated was towards certainty: certainty of services, certainty of tenure. Accordingly we find in the Hundred Rolls and other land registers of the thirteenth century exact specifications of the services due from the

i.e., exclusively by the tenancy of labour], and the Nativi. . . . Though there were 'Servi' on every manor in the earlier times, no distinct mention is made of this class on any of the manors in 1222, though probably the persons described as 'nativi a principio'. . . belonged to it. . . . The ordinary prædial services required from the Tenentes or Villani were not required to be performed in person; and whether in the manor or without it the Villanus was not in legal language 'sub potestate domini.' Not so the Nativus; wherever he was dwelling he was his lord's property, and must return to his manor or be pursued as a fugitive slave. (Bracton, l. i. c. 6, 10). . . . Under the manorial system all the tenants performed prædial services, but the higher was the rank of the tenant the fewer services were due."—Introd., pp. xxi., xxiii., xxvi. "I suspect," says Hallam, "that we go a great deal too far in setting down the descendants of these ceorls—that is, the whole Anglo-Saxon population, except thanes and burgesses, as almost universally to be accounted such villeins as we read of in our law-books, or in concluding that the cultivators of the land, even in the 13th century, were wholly, or at least generally, servile. It is not only evident that small freeholders were always numerous, but we are perhaps greatly deceived in fancying that the occupiers of villein tenements were usually villeins."—Middle Ages, iii. 261. ["The slave is free against everybody but his lord"—"and even against his lord had some standing ground for a civil action." Vinogradoff, Villeinage in England, pp. 69, 70. The whole subject of villeinage is exhaustively and admirably treated in the latter work, which brings out many new points, and firmly establishes them. See also Maitland, Const. Hist., pp. 33 *seq.*; and Pollock and Maitland, Hist. of English Law, vol. i., pp. 412-432, where the status of the villein is fully considered.—Ed.]

(*q*) *Assised* lands = parts of the demesne granted out to tenants subsequently to the original formation of the manor.

(*r*) Hale, Domesday of St. Paul's, Introduct., xxxii.-iii.

various denominations of tenants; and even those villeins who are entered as liable to be talliaged at the will of the lord have their agricultural services accurately determined both in kind and extent. There was another circumstance which favourably affected the condition of the agricultural population. A money economy, as opposed to the mediæval barter in kind, was established in England at a much earlier period, and far more extensively than in the great inland countries of the European continent (*s*). The lords of manors found it more profitable and convenient to receive money payments in lieu of the ancient predial services, and the tenants were very willing by such payments to relieve themselves from the burthen of personal performance of the services. This change was gradually carried out between the end of the thirteenth and the middle of the fifteenth centuries. In this way a numerous class of free labourers arose, and the lords of manors passed into the condition of the landlord of modern times, who must hire, but cannot command, labour.

Early establishment of a money economy in England.

Rise of the class of free labourers.

The first to profit by this change were the higher classes of villeins, who gradually, by force of custom, developed from mere tenants-at-will into customary freeholders and copyholders, with inheritable estates in their lands subject to fixed services (*t*). The lowest class, the *nativi*, still continued for a long time in a state of transition, their birth state of slavery presenting an almost insuperable bar to emancipation otherwise than by the free will of their lords, so long as they continued on the manors to which they were attached. Their ultimate emancipation was due partly to voluntary manumission, which the clergy persistently urged upon the lords, partly to the humane presumptions of the law in favour of liberty, but mainly to the efforts of the slaves themselves, who being in bondage only relatively to their masters, but free as to all the world besides, practically escaped from servitude by flight to distant counties, or sought the shelter of some city or

Villein tenure becomes copyhold. Gradual emancipation of the *nativi*.

(*s*) Nasse, Agricultural Community of the Middle Ages (translated by Ouvry), p. 67.

(*t*) The remarkable transmutation of villein-tenure into copyhold began at least as early as the time of Henry III., and was completely carried out before the reign of Edward IV., when the judges permitted the copyholder to bring an action of trespass against his lord for dispossession.

borough within whose hospitable walls unmolested residence for a year and a day rendered them for ever freemen.

Statutes regulating labour.

The dreadful pestilence of 1348, by greatly reducing the number of the new class of hired labourers, nearly doubled the value of their labour—to the great loss of those landed proprietors who had commuted the predial services of their tenants. The landlords, with an utter disregard of the rights of the labourers, had recourse to the statute of 1349, and to a series of similar statutes between that year and 1368, by which every able-bodied man, not living of his own nor by any trade, was compelled to hire himself to any master who should demand his services, at such wages as were paid three years previously, or for some time preceding. These statutes, while failing in the object which they had in view, as appears by the frequent complaints of the commons that they were not kept, greatly increased the general discontent of the peasantry (*u*). In a great many manors at this period the ancient services still remained due, but the villeins, lured by the prospect of high wages, impatient of the burthens of predial service, and animated by the general democratic spirit which the progress in knowledge and refinement had excited throughout Europe, began to confederate for the purpose of resisting their lords. A statute of the first year of Richard II., passed "at the grievous complaint of the lords and commons of the realm, as well men of holy church, as

Discontent of the peasantry.

(*u*) The legislation respecting the whole class of free labourers, from the early part of the 14th century till the end of the 15th, was selfish and unjust throughout. "The labourer was never to better his condition. Imprisonment and branding on the forehead with a hot iron was the lot of the fugitive servant, although he had never consented to enter the service of his lord, and had been compelled to do so for wages less than he was justly entitled to receive. Even 'artificers and people of mysteries' were liable to be *pressed* by the lord to get in his harvest (13 Rich. II. c. 3), and if a poor labourer's unmarried daughter of eighteen to twenty years of age had been 'required to serve' any master, she must, under the statutory provisions, either have gone into the service, or have been committed to gaol for refusing. No child could be apprenticed to any useful craft, unless its parents were owners of land yielding a certain amount of yearly rent, and the compulsory service, such as has been described, paid for by a rate of wages below the just level, would be a perpetual cause why servants should have endeavoured to free themselves from their bondage, and why the 'valient beggars' of whom we read should have so greatly increased throughout the country."—Pashley, Pauperism and the Poor Laws, p. 163.

other," for the punishment of recalcitrant villeins, recites that "villeins and tenants of land in villeinage who owe services and customs to their lords, had of late withdrawn their customs and services from them, by comfort and procurement of others their counsellors, maintainers, and abettors, who had taken hire and profit of the said villeins and land tenants; and under colour of exemplifications out of Domesday Book of the manors and villes in which they dwelt, and by wrong interpretation of those exemplifications, claimed to be quit and discharged of all manner of service, either of their body or of their lands, and would suffer no distress or other course of justice to be taken against them; and did menace the servants of their lords with peril to life and limb, and what is more, did gather together in great routes, and bind themselves mutually by such confederacy that each one should aid the other to resist their lords with the strong hand" (*w*). It has been suggested, with much probability, that about this period the lords of manors who had commuted the services of their tenants, attempted to reimpose the old predial burthens, and that this, in conjunction with the irritating poll-tax of twelvepence a head exacted from rich and poor alike (*x*), was the exciting cause of the formidable insurrection of 1381, in which all classes of the villeins—free and slave—made common cause. The actual demands of the insurgents were evidently framed so as to include the grievances of the free agricultural labourers as well as of the *nativi*. They comprised, in addition to a general pardon, (1) the abolition of slavery; (2) a fixed rent of fourpence the acre on lands, instead of the predial services due by tenure in villeinage; and (3) freedom of commerce in market towns without toll or impost (*y*).

Demands of the insurgent villeins in 1381.

(*w*) 1 Ric. II. c. 6 (Stat. Realm), ii. 2.

(*x*) It was ordered, however, that the richer should aid the poorer, and that individual contributions might range from 20*s*. down to 4*d*. Rot. Parl., iii. 90. But this left much scope for oppression on the part of the collectors of the tax.

(*y*) [Maitland, Const. Hist., p. 208, says of the Black Death and the grievances of the labourers in 1381: "One of the greatest economic catastrophes in all history; the guess has been made that it destroyed not much less than half the population. It utterly unsettled the mediæval system of agriculture and industry; wages, of course, rose enormously; Parliament endeavoured by statute after statute to keep them down, to fix a legal rate of wages.

Reaction after the insurrection of 1381.

The immediate effect of the violence of the democratic party was to create a reaction of stern repression. The general charter of manumission (which was clearly illegal) extorted from Richard by the rioters, was annulled by royal proclamation (*z*) and by statute, both Houses of Parliament unanimously refusing to accept the king's offer to agree to the entire abolition of the state of bondage, and affirming, in the exaggerated language of panic, that they would never consent to such a measure even to "save themselves from perishing altogether in one day" (*a*). But the insurrection was really the turning-point in the history of predial servitude. When the panic had passed away, the process of decay, which had begun in the previous century, proceeded at an accelerated pace, and was consummated by the Wars of the Roses, which weakened the authority of the lords over all classes of their tenants, and enabled the latter, in the midst of the political confusion, to make good their independence. In a few exceptional instances the state of servitude lingered on till the commencement of the seventeenth century, when it became extinct without any legislative abolition (*b*).

Decay and ultimate extinction of villeinage.

This attempt produced many of the grievances which burst into flame in the revolt of 1381, one of the most portentous phenomena to be found in the whole of our history."—Ed.]

(*z*) Rymer, iv. 126.

(*a*) Rot. Parl., iii. 100.

(*b*) The last case in which villeinage was pleaded was that of *Pigg* v. *Caley* (1617), (Noy, R. 27), in the 15th of James I. The plaintiff, Pigg, sued the defendant in trespass for taking his horse. The defendant pleaded that he was seised of the manor of D., to which Pigg was a villein regardant, and that defendant and those seised of the said manor had been seised of the plaintiff and his ancestors. The plaintiff replied that he was free, and this issue was found in his favour. Since the extinction of villeinage no form of slavery in England has been recognised by law. But in the colonies it was legalised by statutes 10 Will. III. c. 26, 5 Geo. II. c. 7, and 32 Geo. II. c. 31, and the status of a colonial slave when in England long continued doubtful. As early as Queen Anne's reign, Lord Chief Justice Holt expressed an opinion that "as soon as a negro comes into England he becomes free," and Mr. Justice Powell also declared that "the law takes no notice of a negro" ([*Smith* v. *Brown and Cooper*] [1706] 2 Salk. 666); but the first express adjudication on the subject was not given till 1772, when Lord Mansfield, in the celebrated case of the negro Sommersett, pronounced the decision of the Court of King's Bench that slavery in England is illegal, and that the negro must be set free. (20 State Trials, 1; Broom, Const. Law, [p. 59].) Four years later, in the case of the negro Knight, the Court of Session in Scotland declared the unlawfulness of negro-slavery in that country

Second period, 1389-1397.

Apparent harmony between Richard and his parliament.

II. 1389—1397. During this period of nearly eight years, comparative harmony subsisted between Richard and his parliament. The events of the earlier part of his reign had taught the king discretion, or possibly dissimulation; and the return of John of Gaunt, who had been absent during the late revolutionary proceedings, prosecuting his claim to the throne of Castile, served to keep his brother of Gloucester in check, and exercised a mitigating influence over the excited passions of all parties. A revulsion of popular feeling, somewhat similar to that which in later times brought about the restoration of Charles II., seems to have set in; and the parliament during this period proved complacent and even obsequious. The popular leaders among the nobles were moreover divided by personal jealousies, and thus the commons lacked the powerful support which they had hitherto received. The series of truces with France obviated the necessity for oppressive taxation. The parliament refrained from interfering with the king's household expenses, and repealed the statute by which Edward II. had been deposed (*c*), but they continued the practice of making conditional grants, to be levied only in case of an expedition against the enemy, and on account of the non-fulfilment of this condition, several subsidies were remitted by proclamation. The king on his side behaved with unusual courtesy. In 1399, he ordered the chancellor, treasurer, and other members of his Council, to resign their offices in parliament, and submit themselves to its judgment in case any charge should be brought against them. After a day's deliberation the commons declared, in full parliament, that nothing amiss had been found in the conduct of the ministers, who were consequently restored to their former positions; the king protesting that his complaisance on this occasion was not to be drawn into a precedent (*d*).

Division among the leading nobles.

(Morrison, Dict. of Decisions, iii. 14545). It was not, however, till 1799 that the colliers and salters of Scotland, who, by force of a comparatively modern custom which had grown into recognition since the extinction of the ancient feudal villeinage, had been reduced to a state of serfdom, were declared absolutely free by Statute 39 Geo. III. c. 56. Seven years later the slave trade was prohibited; and on August 1, 1834, colonial slavery itself was abolished. [See *supra*, p. 278.—Ed.]

(*c*) Rot. Parl., iii. 286.

(*d*) *Ibid.* 258.

Haxey's Case (1397).

As soon, however, as Richard, having secured an alliance with the royal family of France, and perceiving the disunion which existed among his principal nobility, fancied himself secure upon his throne, he ventured once more to indulge his natural arbitrary and tyrannical disposition. His first "open defiance of parliament and declaration of arbitrary power" was the prosecution in 1397 of Sir Thomas Haxey, a priest, and probably a representative of the clergy in the lower House (*e*), who had introduced a bill complaining of maladministration and of the excessive charges of the king's household. Its specific allegations were: (1) That the statute requiring sheriffs and escheators to be persons of sufficient lands and rent, and that they should not retain office for more than a year, was not kept or regarded. (2) In the Scottish march, great oppressions and outrages were inflicted by the Scots, contrary to the truces between the two kingdoms, and to the destruction of the march and of the king's lieges; wherefore it was prayed that a remedy might be ordained by the good discretion of the king and lords. (3) That retainers ("vadletz appellez yomen") of the lords (not being familiars and menials with the lords) wore liveries, contrary to the statute passed with the object of preventing the maintenance and duress, by colour of such liveries, done in the country, to the oppression of the people and the disturbance of the execution of the law. Wherefore the commons prayed that the said statute be kept, and a certain punishment be ordained, by advice of the lords, for those who failed to observe it. (4) That the great and excessive charge of the king's household should be amended and diminished: to wit, of the multitude of bishops, who have lordships, and with their retinue are supported by the king; and also of many ladies and their attendants who dwell in

(*e*) His name does not appear in any return of the elections to this parliament, but he was in all probability a proctor of the clergy attending parliament under the *praemunientes* clause. He was a canon of Southwell and afterwards of York, where he was treasurer in 1418, and his tomb still remains in the Minster. See Raine, Fabric Rolls of York Minster [Surtees Soc.], pp. 203-206 [where an interesting account is given of Haxey]; and Stubbs, Const. Hist., ii. 516 and note.

the palace of the king and at his cost (*f*). Richard sent for the lords, who were considering the bill, declared it to be an invasion of his prerogative, and ordered the Duke of Lancaster to demand from the commons the name of the person who had introduced it. This request the commons, with many humble apologies, complied with; and being intimidated by the king, and unsupported in this instance by the nobility, they remained passive while the lords and the king passed an ordinance, in the nature of an *ex post facto* law, declaring it treason for any person to move parliament to remedy anything appertaining to the king's person, rule, or royalty. Two days after (Feb. 7), under this law, Haxey was condemned, on his own confession, to suffer the punishment of a traitor (*g*). This violent proceeding was undoubtedly (to quote the words used in Henry IV.'s first parliament, when the judgment was reversed in both Houses), "en anientisement des custumes de lez communes, encontre droit et la curse quel avoit este devant en Parlement" (*h*). Since the 50th of Edward III., the right of the commons to a control over public expenditure, as well as to freedom of speech in parliament, had been established by its frequent and effective exercise.

Third period, 1397-1399.

III. 1397-1399. The prosecution of Haxey was quickly followed up by the execution of the king's long-cherished project of revenge, the first step towards which was the seizure of the Duke of Gloucester and the Earls of Warwick and Arundel (three out of the five "lords appellant"). The conduct of the parliament was so servile as to render probable the statement of the anonymous monk of Evesham in his Life of Richard II. (*i*), that it was surrounded by the king's troops, and thus coerced into compliance with

Servility of parliament.

(*f*) Rot. Parl., iii. 340. In the recital of Haxey's Bill contained in the pardon ultimately granted to him (Rot. Pat., 20 Ric. II. in Rot. Parl., iii. 407), he is also made to complain of the imposition by the pope of a tax of 4d. in the pound on the clergy of the province of Canterbury.

(*g*) Rot. Parl., iii. 339, 341, 407, 408. As a clerk, his life was spared at the intercession of the bishops; and a full pardon was granted him on the 27th of May.

(*h*) Rot. Parl., iii. 438, 480.

(*i*) Vita Ricardi (ed. Hearne), 133. There is reason to believe that this parliament was also packed. Otterbourne (p. 191) says that the knights returned were elected "non per communitatem, ut mos exigit, sed per regiam voluntatem."

his wishes. Notwithstanding the general and special pardons formerly granted, the Duke of Gloucester, who had been sent to Calais and there murdered, was attainted after his death, the Earl of Arundel was beheaded, his brother, the Archbishop of Canterbury, deposed and banished, and the Lords Warwick and Cobham sent beyond sea. In the short parliament of Shrewsbury, which met on January 28, 1398, and sat only to the end of the month, the proceedings of the parliaments of the tenth and eleventh years of the reign were annulled. The answers of the judges to the questions put by the king at Nottingham, which had been punished by death and exile, were declared to be just and legal (*k*). An attempt was also made to bind future parliaments by enacting that every judgment, statute, or ordinance, made in the present parliament, should in all time to come have the full force of statutes, and that any man who should attempt to repeal or overturn them should be adjudged, and have execution as, a traitor to the king and the realm (*l*). The commons then set the dangerous precedent of granting the king a tax (upon wool and hides) for the term of his life (*m*). The concluding act of the session proved the most disastrous of all to constitutional liberty. It had been the custom to dismiss the members as soon as ever public business would permit, and to appoint a committee to hear and determine such petitions as had not been answered during the sitting of parliament. Accordingly a committee of twelve peers and six commoners was appointed to sit after the dissolution of parliament. It is evident that no further power was intended by parliament to be delegated to these eighteen commissioners than such as had been conferred upon previous occasions. But the words of their appointment were of somewhat indefinite scope, under colour of which the committee usurped the complete rights of the legislature, and exercised all the powers and functions of a full parliament (*n*).

Grant to Richard of a revenue for life.

Appointment of eighteen commissioners.

(*k*) See Hallam, Middle Ages, iii. 77; and for a detailed account, Stubbs, Const. Hist., ii. 521.

(*l*) Rot. Parl., iii. 350-352.

(*m*) *Ibid.* 368.

(*n*) *Ibid.* 369, 372, 385. Among the charges brought against Richard prior

The obscure quarrel between the Dukes of Hereford and Norfolk (the two remaining "lords appellant") gave Richard an excuse for banishing them both. The king was now triumphant over all his enemies. The grant of a revenue for life relieved him from the necessity of summoning a parliament. The committee of eighteen issued ordinances at the king's will, and decreed the penalties of treason against all who should disobey them; and a former declaration of the two Houses, that the king's prerogative was as free and unimpaired as that of any of his predecessors (*o*), was now construed as giving him the power to dispense with such statutes as controlled it. The career of tyranny and extortion upon which Richard had entered alienated all classes of the nation, and speedily led to his deposition. The time had now come of which the parliament had warned the king in 1386, when it became "lawful for his people, by their full and free assent and consent, to depose the king from his royal throne, and in his stead to raise up some other of the royal race upon the same" (*p*). In the solemn exercise of the greatest of its powers, parliament was careful to observe every formality and precaution which the constitutional lawyers of that day could suggest. But although Richard was induced to resign the crown, and Henry of Lancaster laid claim to it, the deposition, the vacancy of the throne, and the subsequent election of Henry, are each recorded in the most distinct terms in the official entry on the rolls of parliament (*q*).

Triumph of the king.

His deposition.

to his deposition, he was accused of having falsified the parliament roll so as to make it appear that the commissioners had received unlimited powers.

(*o*) Rot. Parl., 15 Ric. II. iii. 279.

(*p*) Knyghton, col. 2683.

(*q*) Rot. Parl., iii. 416-424.—[For a political retrospect of the reign of Richard II., see Gneist, Hist. Engl. Const., pp. 440 *seq.*]

CHAPTER IX.

PARLIAMENT UNDER THE LANCASTRIAN AND YORKIST KINGS

AND SUBSEQUENT DEVELOPMENT OF CERTAIN PRIVILEGES.

(1399—1485.)

HENRY IV., HENRY V., HENRY VI., EDWARD IV., EDWARD V., RICHARD III.

The Lancastrian period: its characteristics.

UNDER the Lancastrian kings the parliament was occupied rather in the consolidation and regulation of the results of former contests with the crown, than in the acquisition of any new fundamental rights. The commons continued to exercise, with but slight opposition, the main rights which they had established during the fourteenth century—voting taxes, appropriating the supplies, which they made dependent upon the redress of grievances, examining public accounts, controlling the internal administration, sharing in legislation, and intervening in questions of war and peace, and in all important business, foreign and domestic. But the chief characteristic of the period was the settlement of the internal constitution of parliament, and the establishment of its principal forms of procedure and most essential privileges (*a*). During the latter half of the fifteenth century, the House of Commons became much less dependent than it had been under Edward III., Richard II., or Henry IV. The Wars of the Roses in the first place enhanced the power of the nobles at the expense of the commons, who proved invariably ready to give a parliamentary sanction to the claims of a victorious military leader; and, finally, by almost annihilating the ancient nobility, left the lower House to face unaided the

(*a*) *Cf.* Guizot, Hist. du gouv. représ., ii. 413.

augmented power of the crown. But the growing importance of the popular assembly is proved by the attempts, which were now systematically made by the crown and the nobility, to influence the elections in boroughs as well as in counties. A seat in the House of Commons, even as the representative of a borough constituency, became an object of ambition to the members of what would now be termed county families, and the higher social status to which the burgesses had attained is marked by the fact to which Hallam calls attention, that in the reign of Edward IV., and not before, they received the addition of "esquire" in the returns made by the sheriffs (*b*).

Increased importance of the commons.

Instances of illegal taxation are very rare under the Lancastrian kings. Under Richard II. the system of forced loans, of which we find the commons complaining for the first time in the second year of his reign (*c*), had been very extensively made use of, but the Lancastrian kings seldom had recourse to this means of filling their coffers. In 1400, Henry IV. appears to have obtained an aid from a Great Council, but its members did not pretend to charge any besides themselves (*d*). There is also an instance, during the minority of Henry VI., of illegal conduct with respect to a conditional grant of a subsidy; the Duke of Bedford and other lords having subsequently declared in parliament, with the advice of the judges, and others learned in the law, that the said subsidy was to be at all events collected and levied for the king's use, notwithstanding any condition in the grant (*e*). But these were merely occasional exceptions to the admitted

Taxation: conditional grants, appropriation of supplies, examination of accounts.

(*b*) Midd. Ages, iii. 119. The importance attached to a seat in parliament at this time, and the attempts made to influence the electors, are shown in the contemporary Paston correspondence. In vol. i. p. [337] we find the Duchess of Norfolk soliciting the influence of John Paston, Esq., at a county election. "It is thought right necessarie," she tells him, "for divers causes that my lord have at this tyme in the Parlement suche persones as longe unto him, and be of his menyall servaunts, wherein we conceyve your good will and diligence shall be right expedient." The "menyall servaunts" were "our right wellbelovid cosin and servaunts, John Howard and Syr Roger Chambirlayn." In vol. ii. [i.] p. [51], is a letter to the bailiff of Maldon recommending the election of Sir John Paston. See also Freeman, Growth of Engl. Const., p. 197.

(*c*) Rot. Parl., 2 Ric. II. iii. 62.

(*d*) Hallam, Midd. Ages, iii. 85.

(*e*) Rot. Parl., iv. 301.

legal rule. In the same parliament the commons, in making a fresh grant, not only renewed the former conditions, but appropriated the supply, declaring that "it ne no part thereof be beset ne dispensed to no other use, but only in and for the defense of the said roialme" (*f*). Similar precautions had been taken in the grants made to Henry IV. In the sixth year of his reign (1404) the commons granted a large subsidy on condition that it should be expended for the defence of the kingdom according to the form and extent of the grant, and not otherwise, and two treasurers of war, Thomas, Lord Furnivall, and Sir John Pelham, were appointed and sworn in parliament to receive it, and account to the commons at the next parliament (*g*). Thus, conditional grants, appropriation of supplies, and examination of accounts became the established usage.

Dependence of supply on redress of grievances.

The dependence of supplies on the redress of grievances originated under Richard II. (*h*). It had previously been usual for the king not to answer petitions until the last day of the session, when the supplies had of course been granted. The attempt to invert this order of proceeding had been declared by Richard II.'s judges to be high treason. But in the second of Henry IV. the commons again endeavoured to secure this important lever for the application of parliamentary power. The king resisted firmly, and the commons gave way for the time (*i*), but the practice gradually gained ground (*k*).

First collision between the two Houses.

In 1407 (9 Henry IV.) a proceeding took place which is interesting both as the first instance of a collision between the two Houses (*l*), and as the earliest authority for what

(*f*) *Id.* p. 303.

(*g*) *Id.* iii. 546.

(*h*) [But *cf.* Gneist, Hist. Engl. Const., p. 367, note, whence it appears that as early as 2 Edw. II. a twenty-fifth was granted the king by the commons on the condition of his redressing eight grievances, that were laid before him; which he promised to do. Also in 18 and 22 Edw. III. conditions were made on the grant. *Vide* also on this point, Taylor, Engl. Const., 540.—Ed.]

(*i*) *Ibid.* p. 453.

(*k*) *Cf.* Hallam, iii. 84.

(*l*) This collision led to a declaration of the crown which "placed the king and the two Houses of Parliament each in the separate and independent situation in which they now respectively stand," *cf.* Lords' Reports, i. 359.

are now two well-known axioms of parliamentary law, viz.: (1) That all money bills must originate in the House of Commons, and (2) that the king ought not to take notice of matters debated in parliament, until a decision be come to by both Houses, and such decision be regularly brought before him. It appears that the lords, in the king's presence, had held a debate on the state of the kingdom, and, in answer to his demands, had specified certain subsidies as being requisite for the national defence. The king then requested the commons to send a deputation to the House of Lords to hear and report to their fellows what they should have in command from the king, "to the end that they might take the shortest course to comply with the intention of the said lords." Twelve of the commons accordingly attended and made their report to the rest of the lower House, who were thereupon "greatly disturbed at it, saying and affirming it to be much to the prejudice and derogation of their liberties." "And after that our lord the king had heard this," the entry on the roll proceeds, "not willing that anything should be done at present, or in time to come, that might anywise turn against the liberty of the Estate for which they are come to Parliament (*m*), nor against the liberties of the Lords wills and grants, and declares, by the advice and assent of the Lords, in manner following: that it shall be lawful *for the Lords to commune amongst themselves* in this present Parliament, and in every other in time to come, *in the absence of the king*, of the state of the realm, and of the remedy necessary for the same. And that in like

All money bills must originate in the commons.

The king ought not to notice matters pending in parliament.

[*Vide* also, on this constitutional struggle, Pike, Const. Hist. of House of Lords, p. 340, and Anson, Law and Custom of the Constitution, p. 269; and 9 Com. Journ., 235, 509.—Ed.]

(*m*) The true position of the House of Commons as not being in itself an estate of the realm but the representative of the estate of the commons of England, is here expressed. In the same way, the knights, citizens, and burgesses assembled in the parliament of 1406 (7 Hen. IV.), which settled the succession to the crown, are described as the "procurators and attorneys of all the counties, cities, and boroughs, and of the whole people of the kingdom." Although only elected by a portion of the population they were regarded as in effect procurators and attorneys for the whole. At this period the parliamentary franchise was at its maximum; under Henry VI. it sank to its minimum. Subsequent extensions of the suffrage have been merely attempts to render the essentially representative character of the commons' House more real and national.

manner, it shall be lawful *for the Commons*, on their part, *to commune together of* the state and remedy aforesaid. Provided always that the Lords on their part, and the Commons on their part, shall not make any report to our said lord the king of any *grant by the Commons granted, and by the Lords assented to*, nor of the communications of the said grant, before the *Lords and Commons shall be of one assent* and one accord in such matters, and then in manner and form accustomed, that is to say, *by the mouth of the Speaker of the Commons*, in order that the Lords and Commons may have their will (lour gree) of our said lord the king" (*n*).

Petitions assume the form of complete statutes under the name of *bills*.

Originally, not only grants of money, but, as we have seen, almost all statutes originated in the proceedings of the House of Commons. The practice of drawing up the statutes from the petitions and answers after the session of parliament had closed, led to the commission of frequent frauds on the part of the king's officers, who often entered Acts of Parliament on the rolls, differing materially from what the commons had petitioned for, and the king granted. During the fourteenth and fifteenth centuries many attempts were made by the commons, from time to time, to remedy this abuse. In 1414 (2nd Henry V.) they presented a petition to the king, which is not only important on account of its subject-matter, but interesting as the earliest instance in which the House of Commons adopted the English language in their petitions (*o*). After asserting that it had ever been their liberty and freedom that there should be no statute or law made unless with their assent, the commons proceed: "Consideringe that the Comune of youre lond, the whiche that is, and ever hath be, a membre of youre Parlement, *ben as well Assentirs as Peticioners*, that fro this tyme foreward, by compleynte of the Comune of eny myschief axkynge remedie by mouthie of their Speker for the Comune, other ellys by Petition writen, that ther never be no Lawe made theruppon, and engrosed as Statut and

(*n*) Rot. Parl., iii. 611.

(*o*) Hallam, Midd. Ages, iii. 90. As early as 1363, the chancellor addressed the parliament in English in his opening address. Rot. Parl., ii. 283. [Stubbs, iii. 496.]

Lawe, nother by addicions, nother by diminucions, by no maner of terme ne termes, the whiche that sholde chaunge the sentence, and the entente axked by the Speker mouthe, or the Petitions biforesaid yeven up yn writyng by the manere forsaid, withoute assent of the forsaid Comune. Consideringe oure soverain lord, that it is not in no wyse the entente of youre Comunes, zif hit be so that they axke you by spekying or by writyng, two thynges or three, or as manye as theym lust: But that ever it stande in the fredom of your hie Regalie, to graunte whiche of thoo that you luste, and to werune the remanent." In reply the king, "of his grace especial graunteth that fro hensforth *no thyng be enacted* to the Peticions of his Comune, that be *contrarie of hir askyng, wharby they shuld. be bounde withoute their assent.* Savyng alwey to our liege Lord his real Prerogatif, to graunte and denye what him lust of their Petitions and askynges aforesaide" (*p*). Under Henry VI., the commons made an apparently formal but essentially important innovation, by introducing complete statutes under the name of bills—"petitiones formam actuum in se continentes" (*q*). These were sent up to the lords, and if passed there, presented to the king to be accepted or rejected simply, without any alteration. Later on the House of Lords also began to originate bills, which were sent thence to the commons; and it gradually became the established rule of parliament, that with the exception of money bills, which must come from the commons, and of bills affecting the peerage (*e.g.*, for the restitution of forfeited honours), which must come from the lords, all other bills might be originated in either House.

Dispensing and suspending powers of the crown.

The legislative authority of parliament was still often rendered nugatory by the exercise of the dispensing and suspending powers of the crown. These two terms are frequently used indiscriminately; but there is a very appreciable difference in their strict signification. (1) The dispensing power consisted in the exemption of particular persons, under special circumstances, from the operation of penal laws; being, in fact, an anticipatory exercise

(*p*) Rot. Parl., iv. 22.
(*q*) Ruffhead's Statutes, i. 16 (pref.).

of the undoubted right of the king to pardon individual offenders (*r*). (2) The suspending power was employed in nullifying the entire operation of any statute or any number of statutes; and was in its nature incompatible with the existence of constitutional government.

This encroachment on the liberty of the subject appears to have been derived from the practice of the papacy, whose example in issuing bulls "*non obstante* any law to the contrary," was soon followed by our kings in their proclamations, grants, and writs. Henry III. was perhaps the first to make use of the *non obstante* clause, and his successors throughout the Plantagenet period frequently exerted both the dispensing and suspending power. It was usually, however, only asserted in matters of small moment, and even then it was not allowed to pass without remonstrance and attempts at restraining it. Matthew Paris relates that when Henry III. on one occasion justified his use of the clause *non obstante* by quoting the authority of the pope, he was interrupted by the Prior of the Hospitallers (*s*) with "What is that you say, my lord king? Far be it that such a graceless and absurd speech (*verbum illepidum et absurdum*) should proceed from your mouth. As long as you observe justice you will be king, but so soon as you infringe it you will cease to be king." To which, continues the chronicler, the king too hastily replied: "What do you mean by that, you English, do you wish to cast me down from my kingdom, as was my father before me, and then to slay me?" (*t*).

In the 15th of Richard II. (1391), the commons "for the great affiance that they have in the person of our lord the king and in his very excellent sense, and in the great regard which he has for his crown and the rights of the

(*r*) "To pardon a criminal, after he has been guilty, is indeed less dangerous to society than to give a previous indulgence to the commission of crimes; but in a rude age this difference is likely to be overlooked. Hence the origin of the dispensing power . . . which, as long as it was kept within a narrow compass, appears to have excited little attention."—Millar, Hist. Eng. Gov., ii. 405.

(*s*) The official here referred to was probably Joseph de Chauncey. (Kemble, Introd. to the Knights Hospitallers in England, Camden Soc., p. lxvii.).

(*t*) Matt. Paris, Hist. Major, 854 (ed. 1640).

same, and also in the noble and high discretion of the lords, assented, in full parliament, that the king, by the advice and assent of the said lords, might make such sufferance respecting the Statute of Provisors as should seem reasonable and profitable to him until the next parliament, but so that the said statute be not repealed in any article of the same: and, moreover, that the commons may disagree thereto at the said next parliament and resort to the statute": protesting, at the same time, that this assent "which was a novelty and had never been given before" should not be drawn into precedent. The same limited power of suspension was renewed in Henry IV.'s parliaments (*u*). But in the 1st of Henry V., when the commons prayed that the statute for driving aliens out of the kingdom might be executed, the king granted their request with a proviso that he might dispense with the statute when he pleased. In 1444, however, it was specially enacted by a statute which declared void all patents to hold the office of sheriff for more than a year, not only that the king should not dispense with this provision, but that all pardons and remissions of penalties granted by him to persons acting contrary to it, should be of no effect (*w*). A constant struggle respecting the exercise of this prerogative seems to have been maintained for centuries between the crown and the upholders of constitutional freedom, in which sometimes one side prevailed and sometimes the other (*x*). In Henry VII.'s reign it was decided that the king could not dispense with penalties for an act which was *malum in se* (against common law); but that he could do so with respect to an act which was *malum prohibitum* merely (that is, an offence created by statute) (*y*). Subject to this restriction, and some others, the dispensing and suspending power was repeatedly exercised during the sixteenth and seventeenth centuries, and acknowledged as a legal prerogative of the

(*u*) Rot. Parl., iii. 285, 301.

(*w*) 23 Hen. VI. c. 8.

(*x*) The conflicting authorities on the legality of the dispensing power are summarised in the note to the *Seven Bishops' Case* [1688], in Broom, Const. Law, [pp. 492 *seq.*].

(*y*) *Ibid., loc. cit.*

crown. Under the Stuarts it began to be more frequently abused; and the determination of James II. to employ it as a means of abrogating the fundamental laws of the kingdom eventually cost him his crown. The obnoxious prerogative was finally abolished by the Bill of Rights.

Right of enquiring into public abuses and controlling the royal administration.

The right of enquiring into public abuses, and controlling the royal administration of both home and foreign affairs, was frequently exercised by the commons during the Lancastrian period.

In the fifth of Henry IV. the commons requested the king to remove several of his ministers, together with his confessor, and although the king protested that he knew of no cause or occasion for their removal, yet being assured that whatever the lords and commons did or ordained was for the benefit of himself and kingdom, he removed them; adding that he would do as much by any other about his person whom he should find to have excited the hatred or indignation of his people (*z*).

"Unlearned Parliament."

The "Unlearned Parliament," as that of the sixth of Henry IV. was termed, because lawyers were excluded from it, rescinded the grants already made by the crown, and prohibited the king from alienating the ancient royal inheritance without consent of parliament (*zz*); thus re-asserting the ancient control which the witan had exercised over the granting out of the folkland before it developed into *terra regis*.

Petition of Thirty-one Articles. 8 Hen. IV. 1406.

In the eighth of Henry IV. (1406) the commons presented their famous petition of Thirty-one Articles, which Hallam has characterised as "a noble fabric of constitutional liberty, and hardly perhaps inferior to the Petition of Right under Charles I." Henry accepted all the articles without reserve. The most important provisions were: (i.) The king "should elect and name sixteen counsellors and officers pleasing to God and agreeable to his people, on whom he could rely, to advise him and be of his Continual Council until the next parliament, and a reasonable number of whom should be continually about his person"; none of them to be dismissed without conviction of misdemeanour. (ii.) The chancellor and privy

(*z*) Rot. Parl., iii. 525. (*zz*) *Ibid.* 547.

seal should pass no grant or other matter of the seals contrary to law, or delay any which ought to be passed. (iii.) Persons about the court stirring up the king's or queen's minds against any of their lieges, and duly convicted thereof, to lose their offices and be fined. (vi.) The king's ordinary revenue should be wholly appropriated to his household and the payment of his debts; no grant of wardship or other profit to be made thereout, nor any forfeiture to be pardoned. (viii.) The king "considering the wise governance of other well governed Christian princes, and conforming himself thereto," was to assign two days in the week for the reception of petitions, "it being a most honourable and necessary thing, that such of his lieges as desired to petition him should be heard." No officer of the treasury, chancery, or the household was to enjoy his place for life or term of years; he should personally perform his duties, without appointing a substitute, or letting his office to farm. (ix.) No petition was to be presented to the king by any of his household at times when the Council were not sitting. (x.) The Council should determine nothing cognisable at common law, unless for a reasonable cause and by the advice of the judges. (xi.) The statutes and ordinances regulating purveyance, both those of the household and those made in parliament, were affirmed. (xii-xxii.) Abuses of various kinds in the Council and the courts of justice, including bribery and the exaction of excessive fees, were enumerated and forbidden. (xxiii.) The election of knights of the shire was regulated. (xxiv.) The Council and chief officers of state were to be sworn in parliament to observe the common law of the land, and the statutes and ordinances before made and ordained, as well for the king's household as for the good government of the realm of England. (xxvi.-xxx.) The administration of the courts of law and of the household was to be regulated, and full enquiry made by the chancellor and treasurer of England, seneschal and treasurer of the household, the justices of either bench and the barons of the Exchequer, each in his place and office, into all torts, oppressions and defaults done to the people who had had business therein, and a report sent in to the Great Council in order that full

and due correction might be made. (xxxi.) Finally these articles should be in force only from the beginning of the then present parliament until the close of the next (*a*).

Right of the commons to be consulted as to peace or war and in all questions of national interest.

The right to be consulted in questions of war and peace, which the commons had established under Edward III., and maintained under Richard II., was extended under the Lancastrians so as to include all questions of national interest. In the fourth of Henry V. the parliament confirmed the league between the king and the Emperor Sigismund; and the important Treaty of Troyes was similarly submitted to and ratified by both Houses (*b*). By one of the articles of this treaty it was stipulated that no negotiations with the dauphin should be undertaken without the consent of the three estates of both kingdoms. Accordingly, under Henry VI. both Houses of Parliament granted leave to commissioners on the king's behalf to treat of peace with France. In the same reign, parliament also concurred in the appointment of commissioners to treat of the deliverance of the King of Scots; in the grant of denization to the Duchesses of Gloucester and Bedford; and in the appointment of mediators to reconcile the Dukes of Gloucester and Burgundy (*c*).

Impeachment.

The right of impeaching ministers lay dormant from the reign of Richard II. to the 28th year of Henry VI.; unless we may regard as an informal exercise of it the proceeding of the commons in the first of Henry IV., when, without preferring specific articles of accusation, they petitioned the king that Justice Rickhill, who had been employed to take the late Duke of Gloucester's confession at Calais, and the lords who had formerly impeached the duke and his associates of treason, should be put on their defence before the peers (*d*). In 1449 (28 Henry VI.) the commons determined to prosecute the Duke of Suffolk, William de la Pole (grandson of Michael), on charges of high treason, chiefly relating to his conduct in France while negotiating the unpopular marriage of the king with Margaret of Anjou. The judicial power, which had

(*a*) Rot. Parl., 8 Hen. IV., iii. 585-589.
(*b*) Rot. Parl., iv. 98, 135.
(*c*) *Ibid.* 211, 242, 277, 371
(*d*) *Ibid.* iii. 430, 449.

at one time lodged in the whole parliament, had been declared in 1399, at the suggestion of the commons themselves, to reside in the lords only (*e*). In impeachments the commons are only accusers and advocates, while the lords alone are judges of the crime. But in Suffolk's case the commons appear to have been desirous of a voice in the judgment as well as in the accusation, and accordingly proceeded by what appears to have been a bill of attainder (*f*). But the process was tainted by much irregularity, of which the king took advantage, and, in order to screen his favourite minister and save the life of a probably innocent man, banished him for five years. Suffolk had abstained from putting himself upon his peerage, and while protesting his innocence, placed himself entirely in the king's hands; the king moreover declared that he acted by his own advice and not that of the lords, and not by way of judgment, but on the ground of the duke's submission. But the proceeding was rightly regarded as an illegal stretch of prerogative, and was immediately protested against by the lords, who declared that it should form no precedent to bar them or their heirs of the privileges of peerage (*g*).

Bills of attainder.

It was under the Lancastrian kings that the privileges of parliament first began to attract attention.

Privileges of parliament.

As enjoyed by either House, in its collective capacity or in the persons of its individual members, these privileges are various and important. They all rest either upon the ancient law and custom of parliament solely, or upon that

(*e*) *Ibid* iii. 427.

(*f*) "The proceedings of Parliament in passing bills of attainder, and of pains and penalties, do not vary from those adopted in regard to other bills. They may be introduced into either House, but ordinarily commence in the House of Lords: they pass through the same stages; and, when agreed to by both Houses, they receive the royal assent in the usual form. But the parties who are subjected to these proceedings are admitted to defend themselves by counsel and witnesses before both Houses; and the solemnity of the proceedings would cause measures to be taken to enforce the attendance of members upon their service in Parliament. In evil times this summary power of Parliament to punish criminals by statute has been perverted and abused; and in the best of times it should be regarded with jealousy: but, whenever a fitting occasion arises for its exercise, it is undoubtedly the highest form of parliamentary judicature."—May, Parl. Pract. [1883], p. 744; [*cf.* 12th ed. 1917, pp. 347, 594].

(*g*) Rot. Parl., v. 176-182.

law and custom as defined by statute. Three of them claim special attention: (1) freedom of speech; (2) freedom from arrest and special protection against assault; (3) the right of the commons to determine contested elections (*h*).

(1) Freedom of speech.

(1) Freedom of speech, the essential attribute of every free legislature, may be regarded as inherent in the constitution of parliament. At an early period it was recognised and confirmed as the law of the land. "The Commons did oftentimes, under Edward III.," says Elsynge (*i*), "discuss and debate amongst themselves many things concerning the king's prerogative, and agreed upon petitions for laws to be made directly against his prerogative, as may appear by divers of the said petitions, yet they were never interrupted in their consultations, nor received check for the same, as may appear also by the answers to the said petitions."

Haxey's Case.

The arbitrary violation of the freedom of speech in *Haxey's case* by Richard II. has already been noticed (*k*). This proceeding eventually led to a signal confirmation of the privilege. In the first of Henry IV. (1399) the judgment against Haxey was twice reversed and annulled: in the first instance, on his own petition, by the king and the lords spiritual and temporal; and again on the petition of the commons. The privilege was thus acknowleged by the highest judicial authority—the king and the

(*h*) For a historical and legal account of the various branches of parliamentary privilege, see May, Parliamentary Practice [(12th ed. 1917), pp. 63 *seq.*]. The phrase "privilege of parliament" is now of much wider signification than formerly. In strictness, parliamentary privilege was originally fourfold: (1) free access to the king; (2) the right to the most favourable interpretation by him of parliamentary sayings and doings; (3) freedom of speech; and (4) freedom from arrest. The right of the commons to determine contested elections was not originally regarded as a privilege of parliament, and was not completely established till the reign of Elizabeth. [The question of parliamentary privilege with respect to the House of Lords has been clearly dealt with by Pike, Const. Hist. of House of Lords, pp. 258 *seq.*; and his account should be read as supplementary to May's treatment of the subject. For the privileges of parliament touching freedom of speech, *cf.* Anson, Law and Custom of the Constitution, vol. i. (1911), pp. 159 *seq.*; Maitland, Const. Law, pp. 375 *seq.*—Ed.]

(*i*) Elsynge, Ancient Method of holding Parliaments, p. 177.

(*k*) *Supra*, pp. 284, 285.

House of Lords—and by an enactment of the whole legislature (*l*).

In the next year (2nd Henry IV.) the commons, by their Speaker (*m*), showed the king "how that when certain matters were moved among them, some of their body, to please the king, and to advance themselves, would inform the king of such matters, before the same had been discussed and agreed upon among the said commons,

The king not to take notice of speeches in parliament.

(*l*) Rot. Parl., iii. 430, 434; May, Parl. Prac. (12th ed. 1917), p. 96.

(*m*) [The chief officer, or president (as he might be styled), of each House is the "Speaker," who, in the case of the House of Lords, is, by prescription, the lord chancellor, though when that office is vacant, the peers may elect any other member of their body to occupy the "woolsack," as the Speaker's seat is called. As a rule, the Speaker is a peer, though not necessarily so: the office may be filled by a commoner, as in 1830, when Mr. Brougham, Lord Keeper of the Great Seal, was so appointed.—See May, Parl. Prac. 12th ed. (1917), p. 175. An explanation of this is given by Anson, Law and Practice of the Constitution (1911), i. p. 230: "The woolsack on which the Speaker sits is outside the limits of the House." The duties of the Speaker of the House of Lords are mainly restricted to formalities, such as giving the royal assent to bills which have passed both Houses; the royal sanction to the election of the Speaker of the House of Commons; reading the royal speech, and other formal acts. This office in the House of Lords is not of such dignity as that in the House of Commons, where the Speaker has the sole authority on points of order, and is the incorporation of the privileges of the House. "It is plain," writes Anson, *ibid.*, vol. 1. p. 148, "that the Commons must from the time that they sat apart from the Lords have needed a spokesman to be their medium of communication with the Crown. At any rate, from 1377 there is an unbroken succession of Speakers, described in those days as 'pour-parlour' or 'parlour et procuratour.' Inasmuch as the Speaker was chosen quite as much for the purposes of communication as for the maintenance of order within the House, the Crown claimed and exercised a virtual right of selection, and the Speaker was quite as much the mouthpiece of the sovereign as of the Commons." This claim of the crown to interfere with the free and independent choice of their Speaker by the commons came to an end in 1679 (*vide* case of Sir Edward Seymour), since which time the crown accepts the nominee of the commons. Formerly, it was the practice for the Speaker to hold some high Government office, but this was discontinued in 1742 (when Speaker Onslow gave up the office he held). The Speaker is appointed at the commencement of a new parliament. For the formalities attending his election see Anson, pp. 62 *seq.* The Speaker's duties are, as spokesman and representative of the House to demand its privileges, to communicate its resolutions, its thanks, its censures, its admonitions. (*Ibid.*, p. 149.) He, also, in this capacity issues warrants for the arrest of those who offend against the privileges, and writs to fill vacancies. Again, as chairman of the House, he preserves order in debates, puts questions and declares the result of divisions, and, where there is an equality of votes, he has the casting vote, though otherwise he cannot vote. In addition to the authorities already cited, see Porritt, The Unreformed House of Commons, vol. i., caps. 21 and 22.—Ed.]

The Speaker.

(*a*) of Lords;

(*b*) of Commons.

by which the king might be incensed against them or some of them"; wherefore they prayed him not to take notice of any reports that might be made to him of their proceedings. To this he replied that it was his wish that the commons should deliberate and treat of all matters amongst themselves, in order to bring them to the best conclusion, . . . that he would hear no person, nor give him any credit, before such matters were brought before the king by the advice and consent of all the commons, according to the purport of their petition (*n*).

The declaration of the king, in the ninth year of his reign (1407), acknowledging the right of the commons to initiate money bills and also the independent right of free discussion residing in both Houses of Parliament, has been already referred to (*o*).

Yonge's Case (1455).

In the 33rd of Henry VI. Thomas Yonge, one of the "knights for the shire and town of Bristol," complained to the commons that he had been arrested and imprisoned in the Tower, five years previously, "for matters by him showed in the House"—namely, a motion made by him that, the king then having no issue, the Duke of York might be declared heir-apparent to the crown. The Duke was now protector, and the occasion, therefore, favourable for the presentation of Yonge's complaint and claim for presentation. The commons transmitted his petition to the lords, and the king "willed that the lords of his council do and provide for the said suppliant, as in their discretion should be thought convenient and reasonable" (*p*).

Strode's Case (1512).

Nothing further occurred on the subject of freedom of debate until the fourth of Henry VIII. (1512), when, in consequence of the proceedings in *Strode's Case*, an important Act was passed, which not only admitted, by implication, the existence of the privilege, but was designed to protect, in future, all members of either House from any question on account of their speeches or votes in parliament. Richard Strode, member for the borough of Plympton in Devonshire, had been prosecuted in the

(*n*) Rot. Parl., iii. 456.
(*o*) *Supra*, p. 291.
(*p*) Rot. Parl., v. 337.

Stannary Court (*q*), for having proposed certain bills in parliament to regulate the tinners in Cornwall. He was in consequence fined and imprisoned, as the statute recites, "in a doungen and a depe pytt under grounde in the Castell of Lidford, and there and elsewhere remayned by the space of thre wekys and more, unto such tyme he was delyvered by a wrete of Privilege out of the Kyngges Eschequer at Westminster, for that he was one of the collectours in the said countie for the first of the twoo quyndezims graunted at and in this present Parliament." The statute (*r*) proceeds to declare these proceedings of the Stannary Court void, and further: "That sutes, accusementes, condempnacions, execucions, fynes, amerciamentes, punysshmentes, &c., putte or had, or hereafter to be put or hadde unto or uppon the said Richard, and to every other of the person or persons afore specified that nowe be of this present Parliament, or that *of any Parliament herafter shalbe*, for any bill, spekyng, reasonyng, or declaryng of any mater or maters concernyng the Parliament, to be communed and treated of, be utterly voyd and of non effecte."

Stannaries Court.

(*q*) The court for the Stannaries of Cornwall and Devon is a court of special juri-diction, similar in character to the court of the Lord Warden of the Cinque Ports, the courts of the Counties Palatine of Lancaster and Durham, and other special courts instituted in derogation from the general jurisdiction of the courts of common law, for the local redress of private wrongs. It is founded on an ancient privilege granted to the workers in the tin mines to sue and be sued (in all matters arising within the Stannaries, excepting pleas of life, land, or member) in their own court before a judge called the vice-warden of the Stannaries. This privilege was confirmed by charter of 33 Edward I., and by statutes 50 Edward III and 16 Car. I. c. 15, and the court has been regulated by several recent statutes. Formerly an appeal lay from the Stannary Court to the lord warden, from thence to the privy council of the Prince of Wales as Duke of Cornwall, from thence to the sovereign; but by statute 18 & 19 Vict. c 32, s. 26, an appeal from all decrees and orders of the vice-warden was given to the lord warden assisted by two legal assessors, and from the lord warden a final appeal to the Judicial Committee of the Privy Council. By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 36), all the jurisdiction and powers of the lord warden of the Stannaries assisted by his assessors were transferred to the new Court of Appeal established by that Act. [By the Stannaries Court Abolition Act, 1896 (59 & 60 Vict. c. 45), this court, which still lingered in that of the vice-warden, was finally abolished, and its powers transferred to such of the new county courts as the lord chancellor should direct. For a brief description of various obsolete courts, see Ridges, Const. Law of England (2nd ed. 1915), pp. 278 *seq.*—Ed.]

(*r*) 4 Hen. VIII. c. 8.

Freedom of speech claimed in 1541.

Thirty years later, in 1541, the commons, by the mouth of their Speaker, Thomas Moyle, appear, for the first time, to have included freedom of speech among their "ancient and undoubted rights and privileges" claimed from the king at the commencement of each parliament (*s*).

Declaration of the commons in 1621.

In 1621 the commons declared "that every member hath freedom from all impeachment, imprisonment or molestation, *other than by censure of the House itself*, for or concerning any bill, speaking, reasoning, or declaring of any matter or matters touching the parliament or parliamentary business" (*t*).

The privilege often violated.

But notwithstanding the undoubted right of the commons to the enjoyment of this privilege, it was, like many other of their constitutional rights, frequently violated by the crown during the Tudor and Stuart periods (*u*).

Case of Eliot, Holles, and Valentine (1630).

The last occasion on which it was directly impeached was in the celebrated case of Sir John Eliot, Denzil Hollis, and Benjamin Valentine, whose prosecution was one of those illegal acts which hastened the ruin of Charles I. (*w*). In the fifth year of his reign (1630), a judgment was obtained in the court of King's Bench (*x*) against these members for their conduct in parliament, the statute of the fourth Henry VIII. being falsely assumed to be merely a private Act for the relief of Strode, and not of general application. In 1641, the House of Commons declared all these proceedings in the King's Bench to be against the law and privilege of parliament; and in 1667, after the Restoration, they passed another resolution: "That the Act of Parliament in fourth Henry VIII. commonly entitled 'an Act concerning Richard Strode' *is a general law*, extending to indemnify all and every the members of both Houses of Parliament, in all Parliaments, for and

(*s*) Rot. Parl., 33 Hen. VIII.; May, Parl. Prac. 11th ed. p. 98.

(*t*) Hatsell, Precedents, i. 79.

(*u*) See the cases of Strickland in 1571; of Cope, Wentworth, and others in 1588; and of Sir Edwin Sandys in 1621.—D'Ewes, 166, 410; Com. Journal, 635; *infra*, chaps. xii., xiii.

(*w*) ["Contemporary writers all unite in remarking that, from the moment these judgments were delivered, public feeling in the country inclined to decided resistance."—Gneist. Hist. Engl. Const., 553, note. See also May, Parl. Prac. (12th ed. 1917), p. 98—Ed.]

(*x*) [3 St. Tr. 294; Cro. Car. 181.]

touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of; *and is a declaratory law of the ancient and necessary rights and privileges of Parliament.*" They subsequently resolved "that the judgment given, 5 Car. (i), against Sir John Eliot, Denzil Holles, and Benjamin Valentine, in the King's Bench, was an illegal judgment, and against the freedom and privilege of Parliament." On a conference, both these resolutions were agreed to by the lords; and finally, on a writ of error, the judgment of the court of King's Bench was reversed by the House of Lords, on April 15, 1668 (*y*).

The privilege was confirmed, for the last time, by the Bill of Rights, the ninth article of which declared, "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament" (*z*). ["No privilege of the Commons can be so fundamental as liberty of speech. This is claimed at the opening of every Parliament by their Speaker, and could never be infringed without shaking the ramparts of the constitution"] (*a*). The privilege confirmed by Bill of Rights.

II. The privilege of freedom from arrest or molestation is probably coeval with the first existence of national councils in England. A law of Ethelbert, the first Christian King of Kent, at the end of the sixth century, provides that "If the king call his 'leod' (people) to him [*i.e.*, in the witenagemot] and any one there do them evil, let him compensate with a twofold 'bot' and fifty shillings to the king." So Cnut, in the early part of the eleventh century, declares "that every man be entitled to 'grith' [immunity from molestation] to the gemôt and from the gemôt, except he be a notorious thief" (*b*). This immunity from arrest (except for treason, felony, or breach of the (ii.) Freedom from arrest.

(*y*) Lords' Journ., xii. 223; May, Parl. Prac. (12th ed. 1917), p. 99.

(*z*) Will. and Mary, sess. 2, c. 2; *infra*, ch. xv.

(*a*) [Hallam, iii. 102.]

(*b*) Ethelbert, c. 1; Cnut, Sec. Dooms, c. 83; Thorpe, Anc. Laws and Inst. of Ang.-Saxons. Cnut's law was evidently intended to apply to persons coming to the witenagemot on private business as well as those summoned to give counsel and consent. So a law of Edward the Confessor (Leges Edw. Conf., art. 2, cl. 8) provides "ad synodos venientibus, sive summoniti sint, sive per se quid agendum habuerint, sit summa pax."

peace) is useful and indeed necessary; but formerly not only the members of both Houses, but their servants and their property also, were included in the special protection, during the time over which privilege was supposed to extend, *i.e.*, forty days before and after the meeting of parliament.

Bishop of St. David's Case (1290).

In the 18th of Edward I. (1290) the Master of the Temple petitioned the king for leave to distrain for the rent of a house held of him by the Bishop of St. David's, and was answered: "It does not seem fit that the king should grant that they who are of his council should be distrained in time of Parliament" (*c*); but at another time let him distrain "per hostia et fenestras prout moris est." The privilege was also distinctly acknowledged by the crown in the ninth of Edward II. (1315) in the case of the prior of Malton, who had been arrested on his way from Parliament (*d*). It was not, however, always respected: and at length in the eleventh of Henry VI. (1432), the commons obtained a statute for the punishment of such as assault any on their way to parliament, giving double damages—as in the law of Ethelbert—to the injured party (*e*). But the privilege was not founded on the statute, which was merely declaratory of the ancient law. In a petition to the king in the fifth of Henry IV. (1403), the commons had alleged that, according to the custom of the realm, the lords, knights, citizens and burgesses were entitled to this immunity, and prayed that treble damages should be paid by persons violating it. The king admitted the privilege, but refused to extend the damages, on the ground that there was already a sufficient remedy (*f*). So in the case of John Atwyll, member for Exeter, in the 17th Edward IV. (1447), the commons affirmed that the

Prior of Malton's Case (1315).

Statute 11 Hen. VI. c. 11.

Petition of commons, 5 Hen. IV.

Atwyll's Case (1477).

(*c*) Rot. Parl., i. 61.

(*d*) Hatsell, Precedents, i. 12.

(*e*) 11 Hen. VI. c. 11. Three years previously the clergy had got a similar privilege, by statute 8 Hen. VI. c. 1, for themselves and servants on their way to convocation.

Chedder's Case (1403).

(*f*) Rot. Parl., iii. 541. The general principle of immunity was distinctly recognised in the special Act passed in the same year (5 Hen. IV. c. 6) in the case of Chedder, a member's servant, who had been assaulted and wounded.

privilege had existed "whereof tyme that mannys mynde is not the contrarie" (*g*).

Thorpe's Case (1453).

The sole exception to the recognition of this privilege was the celebrated case of Thomas Thorpe, Speaker of the commons, and a baron of the Exchequer, who in 1453 (31 Hen. VI.), during a prorogation of parliament, was imprisoned in the Fleet on an execution, issuing out of his own court of the Exchequer, for non-payment of a fine due to the king for a trespass committed in seizing certain goods of the Duke of York. The commons sent some of their members to complain to the king and lords, and demand the release of the Speaker, and of Walter Rayle, another imprisoned member. The judges, on being consulted by the lords, declared by the mouth of the chief justice, speaking in the name of them all, "after sadde communication and mature deliberation hadde amonge theim," that "they ought not to aunswere to that question, for it hath not ben used aforetyme that the Justicez shuld in eny wyse determine the Privelegge of this high Court of Parlement; for it is so high and so mighty in its nature that it may make lawe, and that that is lawe it may make noo lawe; and the determination and knowlegge of that Privilegge belongeth to the Lordes of the Parlement, and not to the Justices." But they went on to admit the privilege, asserting that "if any persone that is a membre of this high Court of Parlement be arrested in suche cases as be not for treason or felony, or suerte of the peas, or for a condempnation hadde before the Parlement, it is used that all such persones shuld be relessed of such arrestes, and make an Attourney, so that they may have theire fredom and libertee frely to entende upon the Parlement." "As for declaration of procedyng in the lawer Courtes," they observed, "ther be many and diverse Supersedeas of Privelegge of Parlement brought in to the Courtes, but there ys *no generall Supersedeas* brought to surcesse of all processes; for if ther shuld be, it shuld seeme that this high Court of Parlement, that ministreth all Justice and equitee, shuld lette the processe of the commune lawe, and so it shuld put the partie compleynaunt

(*g*) Rot. Parl., vi. 191.

withoute remedie, for so muche as actions atte commune lawe be not determined in this high Court of Parlement." Although, according to this opinion of the judges (notwithstanding their evident disinclination to "lette the processe of the commune lawe"), Thorpe was clearly entitled to his release, the lords determined "that the seid Thomas, accordyng to the lawe, shuld remayn stille in prisone for the causes abovesaid, the Privelegge of the Parlement, or that the same Thomas was Speker of the Parlement, notwithstondyng"; and the commons were directed in the king's name to proceed "with all goodly hast and spede" to the election of a new Speaker, which they did the next day (*h*). This extraordinary decision can only be accounted for by the fact that Thorpe was a staunch Lancastrian, and an old enemy of the Duke of York. The whole case was subsequently characterised in parliament as "begotten by the iniquity of the times" (*i*).

Originally members released from custody by special Act of Parliament or by writ of privilege.

The existence of this privilege, recognised as it had been by statute, by declarations of both Houses, by the frequent assent of the king, and by the opinion of the judges, to which reference has been made, was undoubted: but it was not until the year 1543 that the commons proceeded to deliver a member out of custody, or to commit any one to prison, by their own sole authority. Down to that year members had been released either (1), when taken in execution after judgment, by virtue of a special Act of Parliament; or (2), when confined on mesne process only, by a writ of privilege issued by the chancellor (*k*).

Ferrers' Case (1543). The commons release a member by their own authority.

The first occasion on which the commons acted independently of any other power in the vindication of their privilege was in the important case of George Ferrers, a member who, in 1543, was arrested, as surety for the debt of another, by process out of the King's Bench. On

(*h*) Rot. Parl., v. 239, 240.

(*i*) Com. Journ., i. 546.

(*k*) Hatsell, i. 53; May, Parl. Prac. (12th ed. 1917), p. 107. Special Acts were passed to enable the Chancellor to issue writs for the release of Larke, a member's servant, in 8 Hen. VI., of Clerke, 39 Hen. VI., of Hyde, and of Atwyll, 14 & 17 Ed. IV.—Rot. Parl., iv. 357; v. 374; vi. 160, 191; Hatsell, i. 17-22, 34-36. Arrest on "mesne (intermediate) process" was an arrest by virtue of a writ issued after the commencement of a suit but before judgment.

hearing of the arrest, the House sent their serjeant to demand the release of the imprisoned member. The serjeant, being resisted by the gaolers and sheriffs of London, was obliged to return empty-handed; whereupon the House rose as a body and laid their case before the lords, "who, judging the contempt to be very great, referred the punishment to the order of the Commons' House." The lord chancellor offered them a writ of privilege, but they refused it, "being of a clear opinion that all commandments and other acts proceeding from the nether House were to be done and executed by their serjeant without writ, only by show of his mace, which was his warrant." Accordingly, the serjeant was again ordered by the commons to go to the sheriffs and demand the delivery of Ferrers; but in the meantime the sheriffs, becoming alarmed, had surrendered the prisoner. They were, however, ordered by the House to attend at the bar, together with the gaolers and even the plaintiff in the suit, and on appearing were all committed to prison for contempt. These proceedings were reported to King Henry VIII., who thereupon summoned the chancellor, judges, the Speaker and some of the gravest persons of the commons, and delivered a very remarkable address. After commending the wisdom of the commons in maintaining the privileges of their House, and stating that even their cooks were free from arrest, he is reported to have said: "And further we are informed by our judges that we at no time stand so highly in our estate royal, as in the time of Parliament; wherein we as head, and you as members, are conjoined and knit together in one body politick, so as whatsoever offence or injury, during that time, is offered to the meanest member of the House is to be judged as done against our person and the whole court of Parliament; which prerogative of the court is so great (as our learned counsel informeth us), that all acts and processes coming out of any other inferior courts must, for the time, cease, and give place to the highest." Following the king, "Sir Edward Montagu, the lord chief justice, very gravely declared his opinion, confirming by divers reasons all that the king had said, which was assented unto by all the

residue, none speaking to the contrary" (*l*). Ferrers was a servant of the king, who, probably on that account, was the more inclined to regard the energetic proceedings of the commons with favour.

Henceforward, although a writ of privilege was still occasionally employed to effect the release of members, it was not permitted to be obtained without a previous warrant from the Speaker.

Smalley's Case (1575).

In 1575, Smalley, a member's servant, who had been arrested for debt, was set at liberty by the serjeant of the House; and on its being subsequently discovered that he had fraudulently procured this arrest, in order to get rid of the debt, was committed to prison for a month and ordered to pay the plaintiff £100 (*m*). There are several other instances under Elizabeth of privileged persons being liberated by the serjeant by warrant of the mace and not by writ (*n*); but the next important case was that of Sir Thomas Shirley in 1603, which led to a more distinct recognition of the privilege by statute, and to an improvement in the law. Sir Thomas had been imprisoned in the Fleet, on an execution for debt, before the meeting of parliament. The commons sent their serjeant to demand his release. This being refused by the warden, he was committed to the Tower for contempt; but, still continuing obstinate through fear of becoming personally answerable for the debt, he was further committed to the prison called Little Ease in the Tower. Shortly afterwards, through the interposition of the king, which the commons had privately asked for, the warden delivered up the prisoner and was discharged after a reprimand (*o*). This proceeding directed attention to two legal hardships attending the release of members taken in execution: (1) the sheriff or warden was liable to an action for escape, and (2) the creditor lost his right to an execution. An Act was now passed by which it was for the first time declared: (1) that the officer should be dis-

Shirley's Case (1603).

Statute 1 James I. c. 13. First legislative recognition of the privilege.

(*l*) Holinshed, i. 824; Hatsell, i. 57; May, Parl. Prac. (12th ed. 1917), p. 104.

(*m*) Hatsell, i. 90.

(*n*) See the cases of Fitzherbert in 1592, and of Neale shortly afterwards.—Hatsell, i. 107; D'Ewes, 518, 520; and May, Parl. Prac., p. 104*n*.

(*o*) Hatsell, i. 157; May, Parl. Prac. (12th ed. 1917), p. 105.

charged from all liability for delivering out of custody a person having a privilege of parliament, and (2) that the creditor, at the expiration of the time of privilege, might sue out a new writ of execution. The Act also distinctly recognised as existing law: (1) the privilege of freedom from arrest; (2) the right of either House of Parliament to set a privileged person at liberty; and (3) the right to punish those who make or procure arrests (*p*).

The privilege abused.

The extension of the privilege of members, so as to protect, not only their own persons, but their property, their servants, and their servants' property, from all civil suits during the period of privilege, gave rise to very grave abuses. These were partially restrained by several statutes (*q*), and at length, in 1770, an Act was passed, by which the privilege was reduced to its ancient dimensions, protection from arrest for the persons of members only, leaving the course of justice as to their property and their servants entirely free (*r*). By the effect of these various enactments the freedom of members from arrest has become not so much a parliamentary privilege as a legal right; and consequently "the arrest of a member in a civil cause is . . . irregular *ab initio*, and he may be discharged immediately, upon motion in the court from which the process issued" (*s*).

Arrest of members for contempt of a court of justice.

The privilege of freedom from arrest has always been limited to civil causes, and has never been allowed to interfere with the administration of the criminal law. But as regards one species of offence—contempt of a court of justice—which partakes of a criminal character, it was for some time doubtful how far privilege would avail as a protection for members.

Cromwell's Case (1572).

In 1572, Henry, Lord Cromwell, complained to the lords that his person had been attached by virtue of a writ out

(*p*) 1 Jac. I. c. 13.

(*q*) 12 & 13 Will. III. c. 3; 2 & 3 Anne, c. 18; 11 Geo. II. c. 24.

(*r*) 10 Geo. III. c. 50.

(*s*) May, Parl. Prac. (12th ed. 1917), p. 107; [referring to *Colonel Pitt's Case* (1734), 2 Stra. 985]. [Freedom from arrest, though not taken away from the peers, lost much of its significance, when arrest on mesne process (before judgment given) was in all but certain special cases abolished in the year 1838 (Stat. 1 & 2 Vict. cap. 110, sec. 1). See Pike, Const. Hist. of House of Lords, p. 259; Anson, Law and Custom of the Constitution, vol. i. (1911), pp. 156-9.—Ed.]

of chancery, for not obeying an injunction of that court. The lords agreed that "the attachment did not appear to be warranted by the common law or custom of the realm, or by any statute law, or by precedents of the Court of Chancery," and ordered Lord Cromwell to be discharged. They added, however, that if at any future time it should be shown that by the queen's prerogative, or by common law or custom, or by any statute or precedents, the persons of lords of parliament are attachable, the order in this case should not affect their decision in judging according to the cause shown (*t*). From this period down to 1757, the cases, as regards both lords and commons, were mainly in favour of privilege (*u*); but in that year it was "ordered and declared by the lords that no peer or lord of parliament hath privilege of peerage, or of parliament, against being compelled by process of the courts of Westminster Hall to pay obedience to a writ of Habeas Corpus directed to him" (*w*). In the case of Earl Ferrers, it was decided that an attachment may be granted, if a peer refuse obedience to the writ (*x*).

In more recent times, members committed by courts of law for open contempt have failed in obtaining release by virtue of privilege (*y*). Not that either House of Parliament has waived its right to interfere when members are

(*t*) Lords' Jour., i. 727.

(*u*) See the cases of Mr. Brereton in 1605; of Sir W. Bampfield in 1614; of Lord Vaux in 1625; and of the Earl of Arundel shortly afterwards.—May, Parl. Prac. (12th ed. 1917), pp. 115 *seq.*

(*w*) Lords' Jour., xxix. 181.

(*x*) Burrow, Rep., 631.

(*y*) See the cases of Mr. Long Wellesley in 1831, and of Mr. Lechmere Charlton in 1837, and the reports of the Committee of Privileges.—Com. Journ., vol. 86, p. 701, vol. 22, pp. 3 *seq.* In 1873, Mr. Whalley and Mr. Guildford Onslow, members of parliament, were reprimanded and heavily fined by the Court of Queen's Bench for a contempt of court in connection with the celebrated "Tichborne case": [Chief Justice Cockburn remarking, that if he had seen fit to commit them, he would not have been restrained by privilege.—Ed.] And on Jan. 23, 1874, parliament not being then in session, Mr. Whalley was committed by the same court for a contempt. He was discharged from custody before the 26th, on which day parliament was dissolved. On the meeting of a new parliament the lord chief justice addressed a letter to the Speaker informing him of the facts, and a committee on privilege, to whom the letter was referred, reported that it did not demand the further attention of the House. Hansard, Deb., ccxviii. 52, 108; Report of Parl. Committee, 1874; May, Parl. Prac. (12th ed. 1917), p. 117.

committed for contempt, but each case is considered upon its merits as it arises; and, although where the contempt has been flagrant protection has not been granted, "privilege might still be allowed against commitment under any civil process, or if the circumstances of the case appeared otherwise to justify it" (*z*).

(iii.) Right of the commons to determine contested elections. Early abuse of the sheriff's power of returning members.

III. The growing power of the House of Commons is specially marked, during the Lancastrian period, by the earnest attention bestowed by parliament upon the subject of elections. Owing to the unlimited power of the sheriffs, gross abuses in the return of members very early crept in. It was to the sheriff of each county that the king's writ was addressed, requiring him to return two knights for the county and two citizens or burgesses for each borough in his bailiwick. But as no particular cities or boroughs were specified in the writ, this functionary assumed the power of determining what cities and boroughs should exercise the franchise: and it became the constant practice to omit boroughs which had been in the recent habit of electing members, and to return upon the writ, "There are no more cities or boroughs within my bailiwick." There is some excuse for the sheriffs in the fact that the boroughs for the most part were anxious to be omitted, so as to escape the burthen of paying the wages of their members, and frequently set at naught the writ ordering an election, by sending no return (*a*). But the discretionary power of the sheriffs was often abused by them for the purpose of influencing the elections and falsifying the returns either at the instigation of the crown or of great local magnates (*b*). Several statutes were from time to time passed to prevent these malpractices. So early as the

Attempt to restrain the abuse by statute.

(*z*) May, Parl. Prac. p. 118.

(*a*) The town of Torrington, in Devonshire, even obtained a charter of exemption from sending burgesses to parliament. Hallam, Midd. Ages. iii. 115.

(*b*) In 1312 Matthew Crauthorne complained that the Sheriff of Devon, instead of returning him, a duly elected member, had returned members not chosen by the commons of the county (Palgrave, Parl. Writs, II. ii. 138). In 1386, the bailiffs of Barnstaple, in reply to writs ordering them to pay £6 8s. as the expenses of John Henrys, one of their representatives in the parliament of Oct. 1385 (9 Ric. II.), excused themselves on the double ground, that he was not an inhabitant of the county of Devon nor having any property therein, and that James de Chuddelegh, the sheriff of Devon,

reign of Edward I., the Statute of Westminster I. (3 Edw. I. c. 5) declared that elections ought to be free, and forbade any disturbance of their freedom. In the 5th of Richard II. an Act was passed imposing a fine on sheriffs who should neglect to make a return to parliamentary writs, or omit from such return any city or borough which was bound and formerly accustomed to send members to parliament (*c*). A statute of the 7th Henry IV. (1406), made "on the grievous complaints of the commons of the undue election of the knights of shires for parliament," regulated the time and manner of electing knights and provided for a true return by the sheriff of the result of the election, by requiring the names of the members to be written in an indenture, authenticated by the seals of the persons who had elected them (*d*). An Act, passed four years later (11 Hen. IV.), gave the justices of assize power to inquire into the legality of returns, and inflicted the penalty of one hundred pounds on any sheriff who should return a member not duly elected (*e*). In the 23rd year of Henry VI. (1445), a further attempt was made to check abuses by an act which gave an additional penalty, upon a false return, to the party aggrieved, and required every sheriff duly to deliver a proper precept to the mayor and bailiff of each city or borough in his shire, to elect representatives for parliament, and every mayor and bailiff to make a true return of the members chosen (*f*).

The cognisance of election disputes was originally vested in the king and his council. The first instance of the intervention of the commons in such matters occurred under Richard II., whose reign was so fruitful in constitutional precedents.

First intervention of the commons in election disputes, temp. Ric. II.

In 1384 (7 Ric. II.) the borough of Shaftesbury presented a petition to the king, lords, *and commons*, complaining of a false return by the sheriff of Dorset, and praying

had returned the said John without their assent or knowledge, at the motion of the said John and his friends, for the sake of gain. Return of Members of Parliament, 1213-1702 (printed by authority of Parliament, 1879), p. 225.

(*c*) 5 Ric. II. st. ii. c. 4.

(*d*) 7 Hen. IV. c. 15.

(*e*) 11 Hen. IV. c. 1.

(*f*) 23 Hen. VI. c. 14.

them to order remedy (*g*). In the 5th Henry IV. (1404) the commons prayed the king and lords in parliament that an improper return by the sheriff of Rutland might be examined *in parliament*, and exemplary punishment inflicted in case of default found. The lords thereupon sent for the sheriff and for William Ondeby, the knight returned, as well as for Thomas de Thorp, who had been duly elected, and having examined into the facts of the case, directed the return to be amended by the insertion of Thorp's name in lieu of Ondeby's, and committed the sheriff to the Fleet till he should pay a fine at the king's pleasure (*h*).

In a subsequent case, in the 18th Henry VI. (1439), where the Sheriff of Cambridgeshire had failed to make any return, the commons are not even named, but the matter was determined by the king and the lords.

Under Edward IV., Henry VII., and Henry VIII. there is no record of any interference on the part of the commons; but the imperfect state of the rolls and journals of parliament during these reigns renders this negative testimony of little weight.

Nowell's Case (1553).

In the first year of Queen Mary, the journals of the commons record the appointment of a committee "to inquire if Alexander Nowell, prebendary of Westminster, may be of the House." On the following day they reported that "Alexander Nowell, prebendary in Westminster, and thereby having a voice in the Convocation house, cannot be a member of this House, and the queen's writ to be directed for another burgess in his place" (*i*).

Case of the County of Norfolk (1586).

The next case was that of the county of Norfolk, in 1586. On account of some irregularity in the first return, the chancellor had issued a second writ for this county, and a different member had been elected. The circumstance having been noticed in the House of Commons, Queen Elizabeth directed the Speaker to express her displeasure that "the House had been troubled with a thing impertinent for them to deal with, and only belonging to the charge and office of the lord chancellor, whom she had appointed

(*g*) Prynne, Reg., iv. 261. The result of this petition is not stated.
(*h*) Rot. Parl., iii. 530; Hallam, Midd. Ages, iii. 110.
(*i*) Com. Journals, 1 Mary, p. 27.

to confer with the judges about the returns for the county of Norfolk, and to act therein according to justice and right." The House, however, appointed a committee to investigate the circumstances, who reported in favour of the election under the first writ. While intimating that they had reason to believe that the chancellor, and some of the judges, held the same opinion as themselves, the committee declared that "they had not thought it proper to inquire of the chancellor what he had done, because they thought it prejudicial to the privilege of the house to have the same determined by others than such as were members thereof. And though they thought very reverently of the said lord chancellor and judges, and knew them to be competent judges in their places; yet in this case they took them not for judges in parliament in this house: and thereupon required that the members, if it were so thought good, might take their oaths and be allowed of by force of the first writ, as allowed by the censure of this house, and not as allowed of by the said lord chancellor and judges. Which was agreed unto by the whole house" (*k*).

Case of Goodwin and Fortescue (1604).

James I., in the proclamation summoning his first parliament, attempted to exercise a wide control over parliamentary elections, specifying the kind of men who were to be elected, and specially forbidding the choice of "bankrupts and outlaws." All returns were to be filed in chancery; and any found contrary to this proclamation were to be rejected as unlawful and insufficient, and the constituencies fined. Any person elected contrary to the proclamation was also to be fined and imprisoned (*l*). The question soon came to an issue. Sir Francis Goodwin was elected for the county of Buckingham; but the clerk of the crown refused to receive the return on the ground that Goodwin had been outlawed some years before, and Sir John Fortescue, a member of the Privy Council, was elected by virtue of a second writ. The commons, on the matter being brought under their notice, voted that Goodwin was duly elected, and ordered him to take his seat. The lords requested a conference on the subject, which the commons at first refused, but afterwards acceded to, on being

(*k*) D'Ewes, Journal, 393; Hallam, Const. Hist. (7th ed.), i. 275.
(*l*) Parl. Hist., i. 967.

informed that the request was made at the king's special desire. They justified their decision as to Goodwin, by alleging that owing to some technical informalities, he was not legally an outlaw, and that even if he were, they could prove by precedents that outlaws had sat in the House. The king, in his reply, going beyond the immediate question, took the opportunity to enunciate a doctrine utterly subversive of the free constitution of parliament. "He had no purpose," he said, "to impeach their privilege, but *since they derived all matters of privilege from him, and by his grant*, he expected that they should not be turned against him." He then maintained that legally the House had no right to meddle with returns, which were made into the Court of Chancery, and were within its exclusive jurisdiction. He further denied their assertion that outlaws might legally sit, and requested them to confer with the judges. In face of the king's challenge of all the privileges of the House, involving as it did the vital question of its independence of or subjection to the royal will, it was impossible for the commons to give way on the main point of jurisdiction. But they acted with that combined firmness and reasonableness which in so many constitutional crises has characterised the political action of the English nation. They gave up the minor point, by bringing in a bill to disable outlaws in future from sitting in parliament, but they refused to confer with the judges, affirming that they themselves had always decided in cases of disputed elections. Two days later, after a further message from the king, in which he professed great regard for their privileges, declared himself distracted in judgment on the question in dispute, and desired and commanded as an absolute king, that there should be a conference with the judges in the presence of his Council, the commons gave way on the question of form. The conference with the judges, however, never came off. In an interview between the king himself and the committee who had drawn up the reply of the House, James admitted that the commons were the proper judges of the returns, but requested, as a personal favour, that the return of both Goodwin and Fortescue should be set aside and a new writ issued. To this the House assented, but to satisfy the

scruples of certain members a letter was obtained from Goodwin expressing his concurrence in the arrangement (*m*). The apparent compromise was in effect a victory for the commons, whose right to decide upon the legality of returns, and the conduct of returning officers in making them, was thenceforth regularly claimed and exercised. It was fully recognised as their exclusive right by the court of Exchequer Chamber in 1674 (*n*), by the House of Lords in 1689 (*o*), and also by the courts of law in 1680 (*p*) and 1702 (*q*). Their right was further recognised by the Act 7 William III. c. 7, which declared that "the last determination of the House of Commons concerning the right of elections is to be pursued."

Ashby v. *White* (1702).

The claim of the commons to determine, not merely the legality of elections, but the rights of the electors as well, gave rise, in 1702, to a memorable contest between the lords and commons. One Ashby, a burgess of Aylesbury, having been refused permission to vote at an election, brought an action at common law against William White and others, the returning officers of that borough. He obtained a verdict; but it was moved in the court of Queen's Bench in arrest of judgment, "that this action did not lie," and, contrary to the opinion of Lord Chief Justice Holt, judgment was entered for the defendant; a decision which was afterwards reversed, on a writ of error by the House of Lords, on the grounds upon which Chief Justice Holt had based his dissent in the court below. Upon this the commons, after lengthy debates, passed resolutions affirming that "the determination of the right of election of members to serve in parliament is the proper business of the House of Commons, which they would always be very jealous of, and this jurisdiction of theirs is uncontested; that they exercise a great power in that matter, for they oblige the officer to alter his return according to their judgment; and that they cannot judge of the right of election, without determining the right of electors; and

(*m*) Commons' Journ., i. 149-169; Parl. Hist., i. 993-1017; S. R. Gardiner, Hist. of Eng., 1603-1616, i. 185-188.

(*n*) *Barnardiston* v. *Soame* (1674), 6 Howell, St. Tr. 1092.

(*o*) *Barnardiston* v. *Soame* (1689), 6 Howell, St. Tr. 1119.

(*p*) *Onslow's case* (1680), 2 Ventris, 37.

(*q*) *Prideaux* v. *Morris* (1702), 2 Salkeld, 502.

if electors were at liberty to prosecute suits touching their right of giving voices, in other courts, there might be different voices in other courts, which would make confusion, and be dishonourable to the House of Commons: and that therefore such an action was a breach of privilege." On the other side it was objected, as set forth in the judgment of the House of Lords, that "there is a great difference between the right of the electors and the right of the elected: the one is a temporary right to a place in parliament, *pro hac vice;* the other is a freehold or a franchise. Who has a right to sit in the House of Commons may be properly cognisable there; but who has a right to choose is a matter originally established, even before there is a Parliament. A man has a right to his freehold by the common law, and the law having annexed the right of voting to his freehold, it is of the nature of his freehold, and must depend upon it. The same law that gives him his right must defend it for him, and any other power that will pretend to take away his right of voting may as well pretend to take away the freehold upon which it depends" (*r*).

Case of "the Aylesbury men."

Shortly after the decision of the House of Lords, upholding the claim of Ashby against the returning officers, five other burgesses of Aylesbury, afterwards familiarly known as "the Aylesbury men," commenced similar actions against the constables in their borough. They were thereupon committed to Newgate by the House of Commons for a contempt of its jurisdiction. They endeavoured to obtain their discharge on writs of *habeas corpus*, but without effect, the majority of the judges holding that the commons were the sole judges of their own privileges. The commons further declared the counsel, agents, and solicitors of the plaintiffs guilty of a breach of privilege, and committed them also. The "Aylesbury men" then applied for a writ of error, in order to bring the decision of the judges refusing the *habeas corpus* before the House of Lords; but the commons resolved that no writ of error lay in this case, and petitioned the queen not to grant it. On the other

(*r*) Report of Lords' Committee, 27th March, 1704, upon the conferences in the case of *Ashby* v. *White*; Hatsell, vol. iii. App.; 14 St. Tr. 695-888.

hand, the lords addressed the queen, pointing out that writs of error are writs of right, *ex debito justitiæ* (a contention which was upheld by ten out of the twelve judges, when appealed to by the queen for their advice), and prayed that the writ might be granted. At length the queen put an end to the unseemly contest by a prorogation of parliament, which at once set the "Aylesbury men" and their counsel at liberty. No longer impeded by the interposition of privilege, and supported by the judgment of the House of Lords, the plaintiffs proceeded with their actions, and obtained verdicts and execution against the returning officers (*s*).

Abuse of election jurisdiction of the commons.

The exclusive jurisdiction of the commons in matters of election, which, for the sake of their own independence, they had insisted on and obtained, became subsequently prostituted to the purposes of party, and this abuse reached its greatest height under George II. and George III. (*t*). The evil was remedied as far as possible by the Acts of Mr. Grenville in 1770, and of Sir Robert Peel in 1839; but to the last the constitution and proceedings of election committees "too often exposed them to imputation of political bias." At length, in 1868, the trial of controverted elections was transferred to the judges of the superior courts of law (*u*), thus recurring to the method adopted more than 450 years previously in the election statute of 11 Henry IV.

Qualifications of parliamentary electors and elected.

It was under the Lancastrian dynasty that the first statutes were passed regulating the qualifications of parliamentary electors and of persons to be elected. It is probable that from the first introduction of county representation, but certainly as early as the year 1254 (*w*), the knights of the shire were elected, not merely by the knights or tenants *in capite*, but by all the freeholders of the county

(*s*) *Reg.* v. *Paty* (one of the "Aylesbury Men") (1770), 2 Lord Raymond, 1109.

(*t*) See May, Const. Hist., i. 362-369. "The struggle between Sir Robert Walpole and his enemies was determined in 1741 —not upon any question of public policy—but by the defeat of the minister on the Chippenham Election Petition."—*Ibid.* p. 364.

(*u*) 31 & 32 Vict. c. 125.

(*w*) *Supra*, p. 216.

assembled in the county court (*x*). In the "Good Parliament" of 1376 the commons, in their anxiety to prevent the malpractices of the sheriffs, appear to have attempted to restrict the electoral body in counties. They petitioned that knights of the shire might be chosen by common election of *the better folk of the shires*, and not nominated by the sheriff without due election. Edward III. replied that the knights should be elected by common assent of the *whole county* (*y*). The earliest statute regulating their election, 7th Henry IV. c. 15 (1406) (*z*)—which, having been enacted in answer to a complaint of the commons of "undue" election, may be taken to be declaratory and confirmatory only of the existing custom—places the franchise upon a very popular basis, so as to include not only all freeholders, but all freemen present at the county court on the day of election. It was enacted "that at the next county court to be holden after the delivery of the writ, proclamation should be made, in full county court, of the day and place of the parliament, and that *all they that be there present, as well suitors duly summoned for the same cause as others*, shall attend to the election of the knights for the parliament: and then, *in full county*, they shall proceed to the election, freely and indifferently, notwithstanding any request or command to the contrary" (*a*). But in 1430 (8 Henry VI.) was passed a very remarkable measure—the first disfranchising statute on record—by which the qualification of county electors was restricted to freeholders, and of them to such only as "have free land or tenement to the value of forty shillings by the year at least, above all charges"; with power to the sheriff to examine each elector on oath as to the annual value of his

County franchise.

Property qualification.

(*x*) [*Cf.* Gneist, Hist. Engl. Const., pp. 382 *seq.*, 385, note; Taylor, Engl. Const., pp. 453, 526 *seq.*—Ed.]

(*y*) Rot. Parl., ii. 355; Stubbs, Const. Hist., ii. 453.

(*z*) *Supra*, p. 314.

(*a*) The language of the Act is not free from ambiguity; and some have regarded it as conferring an extension of the suffrage. See Cox, Ancient Parliamentary Elections, 105. Stubbs, however (Const. Hist., iii. 419), maintains, and his contention is supported by the natural inference from the petition of the commons in 1376, together with the king's answer, that "before the close of the reign of Edward III. the whole body of persons assembled made the election whether they were legal suitors or not," and that the Act of 1406 introduced no alteration.

property. Allowing for the change in the value of money, this was equivalent to a real property qualification of from thirty to forty pounds annual value, and must have disfranchised not merely all landless freemen, but a very large number of the smaller freeholders. The county franchise, which had reached its maximum by the time of Henry IV., was now reduced to its minimum. The reactionary tendencies of the times are disclosed in the recital in the Act of the reasons which were thought to render it necessary. It complained that elections of knights of shires had of late been made "by very great, outrageous, and excessive number of people dwelling within the same counties, of the which most part was people of small substance and of no value, whereof every of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires dwelling within the same counties — whereby manslaughters, riots, batteries, and divisions among the *gentlemen and other people* of the same counties shall *very likely* rise and be unless convenient and due remedy be provided" (*b*).

Residence.

Besides fixing a property qualification for voters, this statute also required that both the electors and the elected should be actually resident in the county. This had already been insisted on in 1413, as to both counties and boroughs, by a statute of Henry V. (*c*); and another statute in 1432 (10 Henry VI. c. 2) ordained that the land which gave the vote should be situate within the county. The restrictions as to residence seem to have been generally evaded as early as the reign of Edward IV.; and the statute of Henry V., having proved "almost a solitary instance in the law of England wherein the principle of desuetude has been avowedly set up against an unrepealed enactment," was at length repealed by the 14th George III. c. 58 (*d*).

(*b*) 8 Hen. VI. c. 7.

(*c*) Hen. V. c. 1.

(*d*) Hallam, Midd. Ages, iii. 119. In *Onslow* v. *Ripley* (1781), the court of King's Bench resolved that "little regard was to be had to that ancient statute, 1 Hen. V., *because the common practice of the kingdom had been ever since to the contrary.*"—Peckwell, Reports of Contested Elections, i. 53, note D.

In the reign of Elizabeth, in 1571, a bill was introduced in the commons

Qualification by birth.

The Act of 1445 (23 Hen. VI.) has been already referred to in reference to the restraints put upon the malpractices of the sheriffs; but it is more important on account of one of its provisions, which attempted to establish not only a property qualification for members, but also a qualification of gentle birth, contrary to that important constitutional principle—the legal equality of all freemen below the peerage—which has exercised so beneficial an influence over the English nation. It would seem that the knights of the shire, who had long ceased to be in all cases knights in the strict sense of the term, were sometimes not even gentlemen by birth, and it was now enacted, that henceforth the county representatives should be "notable knights of the same counties for which they shall be chosen, or otherwise such notable esquires, *gentlemen born*, of the same counties as shall be able to be knights; and no man to be such knight which standeth in the degree of a yeoman (*vadlet*) or under (*e*).

to repeal, as to boroughs, the ancient statute of Henry V. and legalise the innovation which time had brought about. The bill appears to have been dropped, but it gave rise to an interesting debate which has been preserved in the pages of D'Ewes' Journal. The supporters of the bill argued the question on its merits, asserting that a man could not be presumed to be wiser for being a resident burgess, and that the whole body of the realm, and the service of the same, was rather to be respected than any private regard of place or person. "This," observes Hallam, "is a remarkable and perhaps the earliest assertion of an important constitutional principle, that each member of the House of Commons is deputed to serve not only for his constituents but for the whole kingdom; a principle which marks the distinction between a modern English parliament and such deputations of the estates as were assembled in several continental kingdoms; a principle to which the House of Commons is indebted for its weight and dignity, as well as its beneficial efficiency, and which none but the servile worshippers of the populace are ever found to gainsay." Those who defended the existing law, and appeared anxious to restore it to vigour, urged that the inferior ranks using manual and mechanical arts ought, like the rest, to be regarded and consulted with on matters which concerned them (an argument which has been revived in the present day in favour of working-men candidates for parliament). But the chief mischief dwelt upon as resulting from non-resident borough members was the interference of noblemen in elections in favour of nominees. Some members proposed to impose a fine of £40 on any borough making its election on a peer's nomination.—See D'Ewes, p. 168; and Hallam, Const. Hist., i. 266.

Valetti.

(*e*) [This "is almost in accordance with the qualification for the office of justice of the peace; indeed, at this period the *custodes pacis* regularly appear as knights of the shire and *vice versa*."—Gneist, Hist. Engl. Const., p. 385; *ibid.* 429 *seq.*—Ed.]

In 1322 (16 Edw. II.) eight knights of the shire returned to the parlia-

Property qualification of members.

The property qualification thus established was considerable, the amount of land which made its owner eligible for knighthood being estimated at £20 annual value,

ment which met in November have the word *valettus* against their names in the enrolment of the writs *de expensis*. They are: for Devon, Richard Chissebych; Worcestershire, John de Stone; Herefordshire, John de Brugge and Philip de Canvouwe; Leicester, Robert de Gaddesby and William Jaunvill; Middlesex, Richard Duraunt and William le Rous. The exact meaning of the term "valettus" at this date is doubtful. In 1445 it was clearly synonymous with "yeoman," and so it would appear to have been in 1397, when "vadletz appellez yomen" are complained of in Haxey's Bill (*supra*, p. 284), and are, by a statute of the same year (20 Ric. II. c. 2), apparently founded on Haxey's complaint, restrained, as well as all others, "de meindre estat," from wearing the "livery of company" pertaining to any lord. "Valet" or "vadelect" seems to have originally denoted honourable service. Selden (Tit. of Honour, fol. 831) speaks of it as being anciently a name specially denoting young gentlemen, even though of great descent or quality, but as subsequently given to persons of the rank of yeoman. A "yeoman" is defined by Sir Tho. Smith (Rep. Anglor. lib. i. c. 24) as he whom our law calls *legalis homo*, a free-born man that may dispend of his own free land in yearly revenue to the sum of forty shillings. But it had also a more general application, denoting, like "valet," a higher kind of service, which still survives in the current phrase to do "yeoman's service." In the household of the mediæval knight or baron, the younger sons of yeomen would form a large proportion of the servitors, and share with the younger sons of knight or esquire the common name of *valetti*. The yeomen, too, who lived on their own land, but wore the "livery of company," of some baron or lesser territorial magnate, would also be his "valets."

Yeomen.

The mediæval "yeoman" was the tenant of land in free socage. The extent of his holding might be large or small. From the year 1278, if it amounted to £20 annual value, he was liable, like the tenant in chivalry, to be compelled to take up knighthood; a burthen from which he was nominally relieved by the Statute *De Militibus* in 1307. (*Supra*, p. 137.) Gentle birth constituted then as now a social distinction, but had as yet received no legal recognition. If a freeholder below the rank of peerage were not a knight, or an esquire, he would, we apprehend, have been classified as a yeoman, "gentleman" not having yet become a designation of legal status. It was not till the 27 Edw. III. (1353) that the words "*gentilis homo*" were adjudged a good addition (Cowell's Interpreter, *s. v.* "gentleman"): and both "esquire" and "gentleman" are rarely found before the stat. 1 Hen. V. c. v. (1413), which required the addition, in original writs and other legal processes, of the "estate, degree or mystery" of the defendant. In the 25 Hen. VI. (1447), the members returned for Surrey were: "John Stanley, squyer," and "William Weston, gentylman." (Parl. Return, 1879, p. 337.) A hundred and twenty years previously Weston would probably have been described as *valettus* or "yeoman." Some of the *valetti* returned in 1322 may, however, have been early instances of county representation by members who were socially as well as legally of yeoman status. Down to 1324 the writs required the election of actual knights, but these were not always obtainable; and as early as 1311, two *homines*, Ralph de Bellafago and Nicholas de Burton,

Gentlemen; esquires.

equivalent to at least £300 a year at the present time. The celebrated statute of Queen Anne—passed to correct the evils of bribery caused by the candidature of rich commercial men without local connections—excluded all but landowners from the House of Commons, the qualification being fixed at £600 a year for county, and £300 a year for borough, members (*f*), which was to be exclusively derived from freehold or copyhold estate (*g*). This invidious and unjust law was maintained until 1838, when the monopoly of the landowners was surrendered, and

were returned for Rutlandshire. (Palgrave, Parl. Writs, ii. pp. 1, 51.) But they were probably not of a lower social grade than that of the ordinary county member. N. de Burton sat again in 1315 and 1318; and William de Burton, *miles*, was member in 1353 and 1357. A John de Bellafago was returned in 1327 and 1328, and Roger de B. in 1338 and 1341. (Return of Members of Parl., 1213-1702.) In 1324 the parliamentary writs directed the return of two knights "or others." (Parl. Writs, ii. i. 317.)

An examination of the recent Parliamentary Return of Members, already cited, gives evidence that most of the eight *valetti* of Nov. 1322 were of the class from which county members were usually drawn. The name of "Ricardus de Chissebech, *miles*," occurs as one of the members for Devon in the parliament which met in May of the same year, 1322. The *valettus* of this name in the Nov. parliament could scarcely have been the same person, but was clearly of the same family, probably a son or other relative, who being neither a knight nor an esquire was properly designated *valettus* or yeoman. Ric. de Chissebech was also member in 1316, -19, -23, and -24; R. de C., *miles*, in 1318, Jan. and Oct. John de Stone, the Worcestershire *valettus* of 1322, appears also as member for that county in 1320, and subsequently in 1323, and in six other years down to 1339. Of the Herefordshire *valetti*, John de Brugge does not appear as a member either before or after 1322, but he is stated in Burke's Extinct Peerage to have been a grandson (Collins, Peerage, ed. 1756, says "the eldest son") of Sir Simon de Brugge (Bruges or Brydges) of that county, and ancestor of the Duke of Chandos. Philip de Canvouwe occurs again in 1337 as "Claynvou." [*Cf.* Thos. de Clanvowe, Kt., 1410, Cal. Lambeth Wills, *Genealogist*, v. 326.] Robert de Gaddesby was member for Leicestershire in 1319, and again in 1327. The name of "Jaunvill" does not again occur, but it has not a plebeian sound. It was probably a various spelling of "Genevill," a baronial family of the 14th century. Of the two remaining *valetti*, William le Rous was again member for Middlesex in 1324, and was evidently related to the Richard le Rous who sometimes with the addition of *miles* and sometimes without sat for that county in nine parliaments from 1297 to 1315. The name of Richard Durant does not appear again, and he may not improbably have been of the yeoman class. The names of William "Tornegold" and Richard "Tulusan" which appear as members for Middlesex, "*loco militum*" in 1319 (Parl. Return, p. 58) seem indicative of a mercantile element in the county representatives.

(*f*) The members for the universities were excepted.

(*g*) 9 Anne, c. 5. A bill to the same effect passed both Houses in 1696, but William III. withheld the royal assent.

Abolished in 1858.

personal property was admitted as a qualification (*h*). At length, in 1858, the law of property qualification, having been systematically evaded from its first establishment, was abolished altogether (*i*). There is only one recorded instance in which the oligarchic provision of Henry VI.'s statute, that knights of the shire should be of gentle birth, was alleged as a disqualification against a parliamentary candidate, and this occurred six years after the law was passed (*k*). But it would be very rare during the reactionary period upon which England had now entered that other than men of aristocratic birth should be returned as county members. The servility of parliament during the Tudor period was in no small degree owing to the political corruption, for which the limited constituencies introduced by Henry VI. afforded every facility.

Borough elections.

In boroughs, prior to the passing of the Act of Queen Anne above referred to, no other qualification was required in the members except that imposed by 1 Henry V. c. 1, that they should be "citizens and burgesses *resiant*, dwelling and *free*, in the same cities and boroughs." The

Who were the electors.

question, Who were the original electors in boroughs? has been the subject of much controversy, and scarcely admits of a positive and general answer, owing to the infinite variety of local electoral customs which municipal records, so far as they have yet been explored, disclose. Mr. Serjeant Merewether and Mr. Stephens, however, in

(*h*) 1 & 2 Vict. c. 48.

(*i*) 21 & 22 Vict. c. 26.

(*k*) In 1450 (29 Hen. VI.) there was a contested election for Huntingdonshire. Robert Stonham and John Styuecley (or "Stucle"), "notabiles armigeri," who had sat for the county in several preceding parliaments, were opposed by a certain Henry Gymber, who was probably the candidate of the yeomen or smaller freeholders, and stood in much the same position as a tenant-farmer candidate at the present day. He secured 70 votes, but the old members polled 424, and in the end were duly returned by the sheriff. The under-sheriff, however, had endeavoured to put in force the provisions of the Act of 1430 as to the examination of electors on oath, and Gymber's supporters threatened a riot; whereupon 124 of the principal freeholders who had voted for Stonham and Styuecley, fearing lest the sheriff should be induced to make a false return, forwarded a statement of the facts to the king, setting forth the number of the votes on each side, and objecting, further, to the return of Gymber, on the ground that he was not "of gentell berthe."—Prynne's 3rd Register, p. 157; Return of Members of Parliament, 1213-1702 (1879), pp. 336, 338, 342, 344; and see Stubbs, Const. Hist., iii. 423, 437.

their learned work on the "History of Boroughs," have adduced very cogent evidence to show that originally the elective franchise was enjoyed by all burgesses, that is, by all the free inhabitant householders paying scot and bearing lot, and sworn and enrolled at the court leet of the borough. The court leet, or burghmoot, was the folk-moot of the borough, just as the shiremoot was the folk-moot of the shire. Those householders only who bore their share of the burthens of the place, who paid scot and bore lot, were entitled to the privilege; those who, from poverty or other cause, did not pay the charges, nor serve the public offices of the borough, were not "burgesses," and therefore excluded (*l*). But whoever may have been the original electors—whether the scot and lot householders, the tenants in burgage, the freeholders generally, or the freemen—very few boroughs retained their electoral system unaltered for any length of time: all were subject to the changes arising from the development of local custom, and the tendency of such development was generally towards a restriction of the franchise (*m*). On receipt of the writ for the election of county and borough representatives, it was the sheriff's duty to issue his precept to the cities and towns in his county; and it was customary for delegates, appointed by their fellow-burgesses for the purpose, to attend in the county court and there either to report the choice of the borough, or themselves to elect the members to serve in parliament. Gradually various select bodies of burgesses, by whatever names distinguished, usurped the

(*l*) *Cf.* Taylor, Engl. Const., pp. 473 *seq.* and references cited, and especially see Gneist. Hist. Engl. Const., p. 621; Gneist, Geschichte des Selfgovernment, 318-325; H. Cox, Ancient Parliamentary Elections; [F. W. Maitland, Township and Borough (1898); S. & B. Webb, English Local Government, 3 vols. (1906-8)—Ed.] In Lib. Assis., 18, Y. B. 38 Edw. III., the persons entitled to be citizens of London were decided to be "those who were born and heritable in the same city by descent of inheritance, *or* who were *resiants and taxable* to scot and lot." The latter is the most general description, and as the former would include all who had heritable houses, so would the latter include all other resident householders who were of free condition. Merewether and Stephens on Boroughs, Introd. xxvi.

(*m*) On the very difficult subject of the mediæval borough electorate, for which the published materials are as yet too imperfect for thoroughly accurate generalisation, see further in Stubbs, Const. Hist., iii. 427-435. [Anson, Law and Custom of Const., vol. i. (1911), p. 107; Maitland, Const. Hist. pp. 88-90.—Ed.]

power, and by long usage acquired a kind of prescriptive right, of election. By the end of the fifteenth century these select bodies had in many places substituted self-election for the suffrages of the whole body of the burgesses. Hitherto these encroachments on the rights of the town populations had gone on in each borough independently and spontaneously, deriving their sanction solely from the binding force of particular local custom. But from the accession of the House of Tudor, the rights of the inhabitants of boroughs were subjected to renewed and more rigid restrictions, through the charters of municipal incorporation which now began to be granted by the crown (*n*). With the privilege of incorporation was usually combined the gift, or revival, of the right of sending representatives to parliament. This right was in many cases exclusively vested in the municipal governing body (the mayor and town council) which as a rule was nominated in the first instance by the crown, and afterwards maintained by self-election. The direct influence of the crown and the nobility over many municipalities was secured by the creation of the office of high steward, which, being held by some local territorial magnate, practically placed the borough representation in his hands. Thus, "for national, as well as local purposes," it has been well observed, "the burgesses were put beyond the pale of the constitution. The power of the crown and aristocracy was increased at the expense of the liberties of the people. The same policy was pursued by the Stuarts; and the two last of that race violated the liberties of the few corporations which still retained a popular constitution after the encroachments of centuries" (*o*). Residence was at first, as we have seen, an essential qualification for a burgess, whether as member or elector; but when the practice of electing non-resident members had been introduced, in open defiance of the parliamentary writ and the statutes of the realm, non-resident electors were also

(*n*) The first charter of municipal incorporation was granted in the reign of Henry VI.

(*o*) May, Const. Hist., iii. 279; *Case of Quo Warranto* (1683), St. Tr. viii. 1093; New Modelling the Corporations, 1687, Hallam, Const. Hist., iii. 74.

admitted. This was extensively resorted to at the restoration of Charles II., when, under the Act of the thirteenth year of that reign, the resident corporators were expelled from their offices by the king's commissioners, and the great officers of state and other persons introduced in their stead.

Although these usurpations were in some places corrected after the Revolution, yet in others they were improperly continued and sanctioned by legal authority. By these various means the right of voting in cities and boroughs became generally restricted either to the mayor and town council, or to that body and its own nominees, the freemen: and by the growth of an infinite variety of local usages, which, though in many cases not really ancient, were judicially recognised as such, the electoral, as well as the municipal, system of boroughs became greatly changed from its primitive popular character. The mass of abuses and anomalies was at length swept away by the Reform Act of 1832 (*p*), and the Municipal Corporations Act of 1835 (*q*). Finally, in 1867, the ancient system of household suffrage, with certain restrictions, which cannot be regarded as in any way more stringent than those which originally existed, was re-established (*r*).

[Whilst political government was maturing in the representative body of the whole nation, local government had fallen more and more into the hands of the "classes," and their nominees, the justices (*s*). There was an utter absence of system and a want of cohesion in local institutions. Although the justices did their work conscientiously and, as a rule, well, yet the incongruity of the various machinery for the conduct of local affairs led to serious anomalies, and in many instances to hardship and injustice.] Sir Erskine May (*t*) pointed out the remarkable parallel exist-

(*p*) 2 & 3 Will. IV. c. 45.

(*q*) 5 & 6 Will. IV. c. 76, amended by 22 Vict. c. 35.

(*r*) The Reform Act of 1867 (30 & 31 Vict. c. 102) admitted to the borough franchise all male occupiers of dwelling-houses (of full age) who have resided for twelve months on the 31st July in any year, and have been rated to the poor rates as ordinary occupiers, and have, on or before the 30th of July, paid such rates up to the preceding 5th January. It also admitted lodgers who have occupied for the same period lodgings of the annual value, unfurnished, of £10.

(*s*) [See *supra*, p. 172.]

(*t*) Const. Hist. iii., p. 276.

ing between the general political history of the country and the history of local government, both in boroughs and parishes: "While the aristocracy was encroaching upon the popular power in the government of the state, it was making advances, no less sure, in local institutions. The few were gradually appropriating the franchises which were the birthright of the many; and again, as political liberties were enlarged, the rights of self-government were recovered. Every parish is the image and reflection of the state. The land, the church, and the commonalty share in its government; the aristocratic and democratic elements are combined in its society. The common law, in its grand simplicity, recognised the right of all the rated parishioners to assemble in vestry and administer parochial affairs. But in many parishes this popular principle gradually fell into disuse; and a few inhabitants—self-elected and irresponsible—claimed the right of imposing taxes, administering the parochial funds, and exercising all local authority. This usurpation, long acquiesced in, grew into a custom, which the courts recognised as a legal exception from the common law. The people had forfeited their rights, and select vestries ruled in their behalf." A partial remedy for this abuse of parochial government was applied by Sturges Bourne's Act in 1818 (58 Geo. III. c. 69), and by Sir John Hobhouse's Vestry Act (1 & 2 Will. IV. c. 60) in 1831 (*u*).

Regencies.

Henry VI. was only nine months old when he succeeded to the throne. His long minority, and the mental imbecility which he evinced on reaching manhood, rendered his reign practically a perpetual regency. Nominally, a protector of the kingdom was only appointed at Henry's accession, and on two other occasions, once when the king was specially afflicted by his malady, and again in 1455, when, after the first battle of St. Albans, the Duke of York was stretching forth his hand towards the throne. The action of parliament with reference to the question of regency forms an interesting point in constitutional history. During the temporary absence from the realm of our Norman and early Angevin kings, the government of the kingdom devolved officially on the chief justiciar, and from

(*u*) [As to local government, see further *infra*, chap. xviii., *in init.*]

the reign of Henry III. it became common to appoint lords justices, or *custodes regni*—usually by royal authority only (*w*). But these appointments scarcely fall within the stricter sense of the term "regency," which connotes the infancy or other natural incapacity of the reigning king. Owing probably to the ancient elective character of the English kingship, the common law makes no provision for the case of an infant king, who, in judgment of law, can never be a minor, and has therefore no legal guardian (*x*). But *pari passu* with the gradual establishment of hereditary succession to the crown, the national council, besides altering the course of succession as occasion required, began to exercise the power of vesting the royal authority, during the infancy or other incapacity of the reigning prince, in a protector, guardian, or council of regency. There are fifteen instances in English history of the appointment of a regency, either actual or prospective, each of which demands some notice, and may be here conveniently considered in chronological order.

1. After the hasty coronation of Henry III., who at his father's death was only nine years old (*y*), a council of the prelates and barons who adhered to the young king was summoned to meet at Bristol a fortnight later. By common assent they committed the care of the king and kingdom to William, Earl of Pembroke, the earl marshal, with the title of *Rector Regis et Regni*. With the marshal was specially associated the legate Gualo, and the Bishop of Winchester (Peter des Roches) (*z*); but his powers were practically limited by the advice of the baronage generally. Henry III. 1216.

2. In 1271, prior to Henry III.'s death, an arrangement had been made for the guardianship of the realm during his son's absence. In accordance with this, on the day Edward I. 1272.

(*w*) This practice was revived after the death of Mary II. in 1695, when lords justices, consisting of the principal officers of State, and the Archbishop of Canterbury, were appointed to carry on the government during William III.'s absence from the realm on his foreign expeditions.

(*x*) Co. Lit., 43. Coke reasons thus: "In judgment of law the king, as king, cannot be said to be a minor: for when the royall bodie politique of the king doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie."

(*y*) *Supra*, p. 123.

(*z*) Walt. Covent., ii. 233. Matt. Paris, Chron., Maj. [Rolls ed., III. p. 2.]

after the king's decease, the Great Seal was delivered to Walter Giffard, Archbishop of York (the see of Canterbury being vacant), who, with the assistance of Roger de Mortimer, a baron, and Robert Burnell, one of the royal clerks, carried on the government until Edward's return in August, 1274 (*a*). Their powers were confirmed in the national assembly which met at Westminster on January 14, 1273, and swore allegiance to the absent king (*b*).

Edward III. 1327.

3. After the deposition of Edward II. and the election and coronation, on January 29, 1327, of his eldest son Edward (*c*), then of the age of fourteen, the parliament, which had been in session since January 7, proceeded to provide for the government of the kingdom. For this purpose they appointed a standing council, "a sort of parliamentary regency" as it has been termed, consisting of four bishops, four earls and six barons, with the king's cousin Henry, Earl of Lancaster, at their head, to advise the king in all matters of government (*d*).

Richard II. 1377.

4. Richard II. was only eleven years old at the date of his accession. But however incapable naturally of exercising sovereign authority, he was regarded as in the legal enjoyment of it, and no regent was appointed. The Great Seal, according to the subtle reasoning of the lawyers of that age, was supposed to possess a sort of magical influence rendering any government legal. The day after his grandfather's death, Richard received the seal from the hands of its keepers, and delivered it to his uncle, John of Gaunt, Duke of Lancaster, for safe custody. Four days afterwards it was handed over to the Bishop of St. David's, who was thus enabled to legalise all acts of the government. But although no regent was appointed, the House of Lords nominated a council of twelve, composed of two bishops, two earls, two barons, two bannerets, and four knights, without whose concurrence no measure was to be carried into effect. This council was modified from time to time

(*a*) Seventh Report of Dep. Keeper of the Public Records (1846), App. ii. 259; Royal and other Letters of Henry III., Rolls Series, ii. 346; Stubbs, Const. Hist., ii. 108-109.

(*b*) Ann. Winton., 113. See *supra*, p. 188.

(*c*) *Supra*, p. 190.

(*d*) Rot. Parl., ii. 52; Knyghton, col. 2556.

by parliament, which itself acted as "a great council of regency" during the earlier years of Richard's reign (*e*).

Henry VI. First regency. 1422.

5. At the accession of Henry VI. (September 1, 1422) far more regularity and deliberation were shown in supplying the defect in the executive authority. Henry V. on his deathbed had expressed a wish that his younger brother Humphrey, Duke of Gloucester, should act as regent in England, while his other brother John, Duke of Bedford, conducted the government in France (*f*). But this disposition was disregarded by the parliament. On hearing of the late king's death, several of the lords, spiritual and temporal, chiefly members of the old council, met together, and provided for the exigencies of government by issuing commissions to judges, sheriffs, and other officers, to continue in the exercise of their respective duties, and also writs for a new parliament. This was opened on November 9 by the Duke of Gloucester, as commissioner appointed in the king's name, with the consent of the council, under the Great Seal; and at once proceeded to ratify all the acts of the peers who had taken on themselves the administration and summoned the parliament. Some weeks later it is recorded in the rolls that the king, "considering his tender age and inability at present to direct in person the concerns of his realm, by the assent and advice of the lords spiritual and temporal, and of the commons, ordains and constitutes (after he shall have returned to England and so long as he shall remain in the kingdom, and it shall please the king) his uncle the Duke of Bedford, now in parts beyond sea, and during his absence the king's other uncle the Duke of Gloucester, now in England, to be *protector and defender* of the kingdom and English Church, and the king's chief counsellor." Letters patent were afterwards passed to this effect, but the tenure of the office was expressly limited to the king's pleasure. Sixteen counsellors were afterwards appointed in parliament to assist the protector in the

(*e*) Rot. Parl., iii. 386; Hallam, Midd. Ages, iii. 186.

(*f*) Gesta Hen. Quinti [Eng. Hist. Soc.], 159; but see J. de Waurin, 1399-1422, Rolls ed., 423. The fact that the truth of Gloucester's assertion was answered by a denial of the king's right to dispose of the governance of the kingdom by testament, affords a strong presumption that such assertion was correct.

administration, with an almost unlimited power of veto on the removal and appointment of officers (*g*).

The nature and extent of the powers committed to the protector may be learnt from the written answer of the lords to a request of the Duke of Gloucester, in the parliament of the sixth year of Henry's reign (1427-8), that he might be informed what authority he possessed as protector and defender of the realm and the king's chief counsellor. After reminding the duke that at first he had desired "to have had the governance of this land, affirming that it belonged unto you of right, as well by means of your birth as by the last will of the king that was, your brother, whom God assoile; alleging for you such grounds and motives as it was thought to your discretion made for your intent; whereupon the lords spiritual and temporal assembled there in parliament . . . had great and long deliberation and advice, searched precedents of the governail of the land in time and case semblable, when kings of this land have been tender of age, took also information of the laws of the land of such persons as be notably learned therein, and finally found your said desire not caused nor grounded in precedent nor in the law of the land: the which the king that dead is, in his life nor might by his last will nor otherwise alter, change, nor abrogate, without the assent of the three estates, nor commit or grant to any person governance or rule of this land longer than he lived." And that nevertheless "it was advised and appointed by authority of the king, assenting the three estates of this land, that ye, in absence of my lord your brother of Bedford, should be chief of the King's Council, and devised therefore unto you a name different from other counsellors, not the name of tutor, lieutenant, governor, nor of regent, nor no name that should import authority of governance of the land, but the name of protector and defensor, the which importeth a personal duty of entendance to the actual defence of the land, as well against enemies outward, if case required, as against rebels inward, if any were, that God forbid; granting you therewith certain power, the which is specified and contained in an Act of the said parliament, it to endure as

(*g*) Rot. Parl., iv. 169-176; and see Hallam, Midd. Ages, [iii.] 186.

long as it liked the king." The lords then proceed to exhort and require the duke, "to content you with the power above said and declared, of the which my lord your brother of Bedford, the king's eldest uncle, contented him; and that ye none larger power desire, will, nor use; giving you this that is above written for our answer to your foresaid demand, the which we will dwell and abide with withouten variance or changing" (*h*). From these proceedings it appears to have been already recognised as constitutional law: (1) That the king does not possess the power of nominating a regent during the minority of his successor; and (2) that neither the heir presumptive, nor any other person, is entitled to exercise the royal prerogative during the king's infancy (or, by parity of reasoning, his infirmity): but that the sole right of determining the persons by whom, and the limitations under which, the executive government shall be conducted in the king's name and behalf, resides in the great council of parliament (*i*).

Principles of constitutional law recognised, 1427-8.

6. In 1454 (32 Henry VI.), it having been reported to the House of Lords by a deputation of twelve peers who had waited upon the king, that his mental derangement was such that they "could get no answer nor sign" from him, the lords "elected and nominated Richard, Duke of York, to be protector and defender of the realm of England during the king's pleasure," with powers similar to those which had been formerly conferred upon the Duke of Gloucester. An Act of Parliament was subsequently passed, constituting the Duke of York protector of the church and kingdom and the king's chief counsellor during the royal pleasure, or until the Prince of Wales (then under two years old) should attain years of discretion, on whom the said dignity was immediately to devolve (*k*). In less than a year the king became slightly better, and at once annulled the Duke of York's protectorate. Hitherto the lords had assumed the exclusive right of choosing the protector, the commons being merely assenting parties to the Act which ratified his election. But on the next occasion, the commons—who were for the most part strong partisans of the White Rose—

Henry VI. Second regency. 1454.

(*h*) Rot. Parl., iv. 326.
(*i*) Hallam, Midd. Ages, iii. 189.
(*k*) Rot. Parl., v. 240-243.

took a much more active part, and would appear to have forced the lords unwillingly to reappoint the Duke of York.

Henry VI. Third regency. 1455.

7. The king being a prisoner in the hands of the Yorkists, after the first battle of St. Albans, was obliged to appoint the duke his lieutenant to open parliament in November, 1455. The commons immediately proposed to the lords that "whereas the king had deputed the Duke of York as his commissioner to proceed in this parliament, it was thought by the commons that, if the king hereafter could not attend to the protection and defence of the land, an able person should be appointed protector, to whom they might have recourse for redress of injuries." While the lords were considering the matter the commons, two days afterwards, repeated their request; and after they had left the chamber, the chancellor declared that "it is understood that they will not further proceed in matters of parliament to the time that they have answer to their desire and request." Having a third time pressed for an answer, the commons were at length informed that "the king our sovereign lord, by the advice and assent of the lords spiritual and temporal being in this present parliament, had named and desired the Duke of York to be protector and defensor of this land." In the act of ratification the duke was to hold his office not "during the king's pleasure," as formerly, but "until he should be discharged of it by the lords in parliament" (*l*). Before the end of February, 1456, the king had once more recovered his reason, and resumed the personal exercise of the royal functions (*m*).

Edward V. 1483.

8. On the accession of Edward V. at the age of thirteen, the queen-mother claimed and endeavoured to obtain the regency, but the Duke of Gloucester (afterwards Richard III.) having marched to London and secured the person of the king, was appointed by a Great Council of prelates, nobles, and chief citizens, "protector of the king and kingdom."

Regency Act, 28 Hen. VIII. c. 7. 1536.

9. By statute 28 Henry VIII. c. 7, it was provided that the successor to the throne, if a male and under eighteen, or if a female and under sixteen, should be until such age

(*l*) Rot. Parl., v. 284-490; Hallam, Midd. Ages, iii. 192.
(*m*) Rot. Parl., v. 321.

in the government of his or her natural mother (if approved by the king), and of such other counsellors as the king by letters patent or by his will should appoint; and the king accordingly appointed his sixteen executors to constitute the Privy Council, and exercise the authority of the crown, until his son Edward VI. should attain the age of eighteen. By these executors the Earl of Hertford (afterwards Duke of Somerset), the king's maternal uncle, was appointed protector of the realm and guardian of the king's person. This arrangement, though contrary to the late king's will, was confirmed by the assent of the lords spiritual and temporal; and shortly afterwards the protector procured a grant of his office, with almost unlimited powers, by letters patent from the young king (*n*).

Regency Act, 24 Geo. II. c. 24. 1751.

10. No other instance of appointing a regent occurred till the year 1751, when, after the death of Frederick, Prince of Wales, an Act was passed appointing the Princess Dowager of Wales to be guardian and regent, in case the crown should descend to any of the children of Frederick, Prince of Wales, under the age of eighteen years. A Council of Regency was also nominated by the Act; but the king was empowered to add four other members by instrument under his sign manual, to be opened after his death (*o*).

George III. First Regency Act, 1765.

11. The proceedings during the reign of George III. have a special importance as recent precedents. In 1765 an alarming illness led the king to consider the necessity of providing for a regency in case of his death. At first he wished parliament to confer upon him the unconditional right of nominating any person as regent whom he might select (*p*). But by the Regency Act, as ultimately passed, the king was empowered to nominate, under his sign manual, either the queen, the Princess Dowager of Wales, or any descendant of George II. residing in this kingdom, to be guardian of his successor (while under eighteen years of age) and "regent of the kingdom." A Council of Regency was appointed by the Act, which also defined its powers and those of the regent (*q*).

(*n*) Burnet, ii. 4, 15.
(*o*) 24 Geo. II. c. 24.
(*p*) Walpole's Mem., ii. 98.
(*q*) 5 Geo. III. c. 27.

Proceedings on the king's illness in 1788.

12. On two occasions during the illness of George III., in 1788-9, and again in 1810, the name and authority of the crown through the means of letters patent under the Great Seal affixed by the authority of both Houses of Parliament—were used for the purpose of opening parliament when the king was personally incapable of exercising his constitutional functions. In 1788, in the discussions concerning the appointment of a regent, Fox "advanced the startling opinion that the Prince of Wales had as clear a right to exercise the power of sovereignty during the king's incapacity as if the king were actually dead; and that it was merely for the two Houses of Parliament to pronounce at what time he should commence the exercise of his right" (*r*). Pitt, however, firmly maintained the absolute right of parliament to make what provision it thought fit for carrying on the government, and the Duke of York, in the House of Lords, disclaimed the right on behalf of the prince, who "understood too well the sacred principles which seated the House of Brunswick on the throne, ever to assume or exercise any power, be his claim what it might, not derived from the will of the people, expressed by their representatives and their lordships in parliament assembled" (*s*). A Regency Bill was introduced in the commons and sent up to the lords, but the king's sudden recovery put a stop to all further proceedings. In 1810, when the king was seized with his last mental disorder, the proceedings of parliament were grounded generally upon the precedent of 1788. An Act was ultimately passed the royal assent being given by commission under the Great Seal authorised by a resolution of both Houses—by which the Prince of Wales was empowered to exercise the royal authority as regent, in the name and on behalf of the king but subject to many important limitations, particularly specified (*t*).

Second Regency Act, 1810.

Regency Act, 1 Will. IV. 1830.

13. By the statute 1 William IV. c. 2, the Duchess of Kent was appointed guardian and regent in the event of

(*r*) May, Const. Hist., i. 177.

(*s*) Parl. Hist., xxvii. 678, 684.

(*t*) For a short but comprehensiv summary of the important proceedings relative to the regency under Geo. III., see May, Const. Hist., i. 175-215; [also Maitland, Const. Hist., pp. 345, 346, and Lecky, Hist. of England in the Eighteenth Century, vol. vi. pp. 416-27.—Ed.]

her Majesty [Queen Victoria] coming to the throne before attaining the age of eighteen years; and, contrary to former precedents, no provision was made for a controlling council, but the regent was left to carry on the government through the responsible ministers of the crown, and to act upon their advice alone.

First Regency Act. Queen Victoria, 1837.

14. On the accession of her Majesty, the king of Hanover became presumptive heir to the throne, and an Act was passed providing that in the event of the queen's decease, while her successor was out of the realm, the government should be carried on in his name by lords justices until his arrival (*u*).

Second Regency Act, 1840.

15. The last occasion on which parliament exercised its powers of appointing a regent was on the queen's marriage, in 1840. An Act was passed by which, in the event of any child of her Majesty succeeding to the throne under the age of eighteen, Prince Albert, as the surviving parent, was appointed regent, without any Council of Regency, or any limitation upon the exercise of the royal prerogatives, except an incapacity to assent to any bill for altering the succession to the throne, or affecting the uniformity of worship in the Church of England, or the rights of the Church of Scotland (*w*).

From this general view of the history of regencies we must now return to the particular period of which this chapter more especially treats.

Parliament under Edward IV. and Richard III. has no history.

Under Edward IV. and Richard III. parliament has no history. The nobility, thinned by civil war and the hands of the executioner, and split up into contending factions, were unable to offer any political resistance to the power of the crown. The commons, by themselves, were as yet unequal to the contest. Under Edward IV. both lords and commons, instead of contending, like their predecessors, for the establishment of rights and the redress of grievances, were subservient to the royal will. His was the first reign in which no public remedial statute was passed, nor even a petition presented similar to those with which we have seen

(*u*) 1 Vict. c. 72.
(*w*) 3 & 4 Vict. c. 52.

1477-1483, no parliament.

the commons, in former reigns, approaching the throne (*x*). For five years, from January, 1477, to November, 1483, no parliament was summoned,—a suspension of the national council without example since 1327. In money matters Edward appears to have made himself, as far as possible, independent of parliamentary grants. He derived a very large income from the numerous forfeited estates of his enemies; and all the feudal dues and the customs duties on merchandise were exacted with the greatest rigour. He also extorted frequent tenths from the clergy, and, discarding the specious appellation of "loans," by which former kings had endeavoured to disguise the forced contributions of their subjects, he compelled the richer classes to make apparently voluntary gifts, under the new and less plausible name of "benevolences." As already mentioned, no complaint of any kind appears in the parliamentary records of his reign; but it is evident from a passage in the remarkable address presented to Richard, Duke of Gloucester, when invited, in 1483, to assume the crown, that the nation, though hitherto silent, had not been insensible to the illegality. "For certainly wee be determined," say the authors of the address, "rather to aventure and com[m]itte us to the perill of oure lyfs and jopardye of deth, than to lyve in suche thraldome and bondage as we have lyved long tyme heretofore, oppressed and injured by Extorcions and newe Imposic[i]ons, ayenst the Lawes of God and Man, and the Libertee, old Police and Lawes of this Realme, wheryn every Englishman is enherited" (*y*). Accordingly, in Richard III.'s only parliament, benevolences were declared by statute to be for ever illegal (*z*).

Benevolences.

Sir John Fortescue's testimony to the freedom of the constitution.

Our consideration of the growth of constitutional government during the fifteenth century may be appropriately closed by a quotation which "no writer on the English Constitution," says Hallam, "can be excused from inserting." Sir John Fortescue, Chief Justice of the King's Bench under Henry VI., in his treatise "De Laudibus

(*x*) In Edward IV.'s last parliament, in 1483, the commons ventured to make some complaints with respect to the wearing of liveries, the maintenance of the public peace, and one or two other topics. Rot. Parl., vi. 198.

(*y*) Rot. Parl. [vi.] 241.

(*z*) 1 Ric. III. c. 2.

Legum Angliae," written for the instruction of that king's young son Edward, Prince of Wales, gives the following exposition of the nature of the English kingship: "A king of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no, without their consent, which sort of government the civil laws point out, when they declare 'Quod principi placuit legis habit vigorem.' But it is much otherwise with a king whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subjects, nor burden them against their wills with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other. The same things may be effected under an absolute prince, provided he do not degenerate into the tyrant. Of such a prince, Aristotle, in the third of his Politics, says, 'It is better for a city to be governed by a good man than by good laws.' But because it does not always happen that the person presiding over a people is so qualified, St. Thomas, in the book which he writ to the King of Cyprus, De Regimine Principum, wishes that a kingdom could be so instituted as that the king might not be at liberty to tyrannise over his people: which only comes to pass in the present case; that is, when the sovereign power is restrained by political laws. Rejoice, therefore, my good prince, that such is the law of the kingdom which you are to inherit, because it will afford, both to yourself and subjects, the greatest security and satisfaction." And again: "As the head of a body natural cannot change its nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood: neither can a king, who is the head of a body politic, change the laws thereof, nor take from the people what is theirs by right against their consent. Thus you have, sir,

the formal institution of every political kingdom, from whence you may guess at the power which a king may exercise with respect to the laws and the subject. For he is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose *he has the delegation of power from the people*, and he has no just claim to any other power but this" (*a*).

(*a*) De Laudibus Legum Angliae, cc. 9, 13. See also his treatise on Absolute and Limited Monarchy, and "De Natura Legis Naturæ." Two centuries previously, Bracton, writing under Henry III., had borne very similar testimony to the limited nature of the English kingship: *Cf.* lib. ii. c. 16. § 3.

[Gneist, Hist. Engl. Const., p. 458, says: "The retrogression of the English Constitution in the last half-century of the Middle Ages, that apparent relapse into the stormy condition of the thirteenth century, is primarily attributable to a coincidence of personal circumstances. The legal relationships of the clergy and the nobility were still characterised by considerable difficulty and want of harmony, but it was only in consequence of the weakness of mind of Henry VI. that this degenerated into a dynastic, aristocratic civil war. The political suicide of the barons in this wild conflict, and the exhaustion which followed the war, could not but tend to strengthen the monarchy as an institution. The knighthood and the cities were in a great measure drawn into these struggles—much against their will, for, from their social position, they were more bent upon the peaceful development of their insular political system in both county and parliamentary organisation; and even the increasing yearning of the lower orders after independence was more inclined towards a royal government than to an organised rule of nobles."—Ed.]

CHAPTER X.

THE TUDOR PERIOD. (1485—1603.)

HENRY VII., HENRY VIII., EDWARD VI., MARY.

General characteristics of the Tudor period.

The Tudor period is almost synchronous with the sixteenth century, an age remarkable for its material prosperity, its intellectual and religious activity, and its political retrogression. The mighty impulse given to commerce by the discovery of America and of the passage of the East Indies by the Cape of Good Hope, coupled with the certainty imparted to the science of navigation by the use of the compass, caused an enormous increase of the wealth of the middle classes. Intent upon the acquisition of private gain, the merchants and traders were for the most part satisfied to leave questions of government to others, so long as they themselves were permitted to pursue their avocations in peace. Simultaneously with the extraordinary expansion of commerce there were other causes at work which tended to withdraw men's minds from the consideration of purely political topics.

The revival of learning, and its rapid dissemination among all classes through the medium of the printing-press, the profound religious agitation of the Reformation, and the spirit of bold enquiry which it excited concerning matters of the deepest interest hitherto generally accepted as beyond dispute— all contributed to concentrate popular attention upon intellectual and religious progress, to the neglect of politics. On the continent of Europe, the introduction of standing armies, and the revolution in the art of war which made it "a distinct science and a distinct trade," had emancipated rulers from the chief restraint on their power—the fear of an armed people and enabled

them either utterly to sweep away, or reduce to empty formalities, the national assemblies which had once been as free and as potent as our own early parliaments. The free constitutions of Castile and Arragon were successfully overthrown by Charles V. and Philip II.; and the States-General of France, after languishing for a time, ceased altogether in 1614, until resuscitated in 1789, for their final meeting on the eve of the Great Revolution. In England, too, parliamentary institutions passed through a season of trial. That they did not perish here as on the continent was mainly due to our insular position, which rendered the nation comparatively secure against foreign invasion, and thus obviated for a lengthened period the necessity of employing regular troops (*a*). In a less degree the personal character of Henry VIII. was also instrumental in the preservation of our liberties. Tyrant as he was, he was yet animated by a scrupulous regard for the *letter* of the law. "While his fellow tyrants abroad were everywhere overthrowing free institutions, Henry was in all things showing them the deepest outward respect. Through his reign he took care to do nothing except in outward and regular legal form, nothing for which he could not shelter himself under the sanction either of precedent or of written law." If he "could get the letter of the law on his side he was satisfied; otherwise his conscience was uneasy" (*b*). This peculiar character of Henry's tyranny, his anxiety to do everything in proper parliamentary and judicial form, "while it degraded parliamentary and judicial institutions at the time, really did a great deal to strengthen and preserve them for better days" (*c*). The parliament was indeed so disgracefully subservient and sycophantic that there was little temptation for the king to endeavour to destroy an institution which served to cover his most outrageous proceedings with a

(*a*) Macaulay, Hist. Eng., i. 34. Henry VII. had a small body-guard of 50 archers, and Henry VIII. 50 horse-guards, each attended by an archer, demilance and coutelier, making 200 in all; but even this small force was, probably on account of the expense, soon given up.

(*b*) Freeman, Growth of Eng. Const., 101; Fortnightly Review, Sept. 1871, on "The use of Historical Documents."

(*c*) Freeman, Fortnightly Review, Sept. 1871.

convenient and plausible appearance of popular approbation. When Henry had cut off Anne Boleyn's head on one day and married Jane Seymour the next morning, the parliament gravely listened to a speech from the lord chancellor, assuring the world that the king did not do it "in any carnal concupiscence," and immediately proceeded to pass an Act declaring that it was all done "of the king's most excellent goodness" (*d*). Such being the temper of the national representatives, it is not surprising to find Henry holding high their privileges, as in *Ferrers' case* (*e*), or writing to the pope, in 1529: "The discussions in the English parliament are free and unrestricted; the crown has no power to limit their debates, or to control the votes of their members. They determine everything for themselves, as the interests of the commonwealth require" (*f*).

The reaction towards absolutism which had set in during the latter part of Henry VI.'s reign, culminated under Henry VIII. "We have got into a state of things," observes Freeman, "when parliaments were ready to proscribe anybody, or to ordain anything, when judges were ready to declare anything to be the law, when juries were ready to find any verdict, when bishops and convocations were ready to declare anything to be true and orthodox, at the mere bidding of the capricious despot on the throne. We have reached the state which our fathers called *unlaw*, not the state when law is silent, but the state when law had turned about and become its own opposite, the state when the institutions which were meant to declare right, and truth, and freedom, had been turned into engines of wrong, and falsehood, and bondage" (*g*). Independently of the general political apathy to which allusion has been made, the extraordinary subservience of parliament during the Tudor age, so unlike its demeanour at an earlier and at a later period, is to be accounted for

(*d*) Speech of Lord Chancellor Audley in 1536. Lords' Journals, p. 84; 28 Hen. VIII. c. 7; Froude, Hist. Eng., ii. 503.

(*e*) *Supra*, p. 308.

(*f*) Froude, Hist. Eng., i. 187.

(*g*) Fortnightly Review, Sept. 1871.

by the fact that the old nobility, the leaders in former struggles for liberty, had been cut off in the Wars of the Roses, and the commons had not yet acquired sufficient importance and self-reliance to act alone. The temporal lords summoned by Henry VII. to the parliament of 1485 were only twenty-nine in number, and of these several were new creations. The new nobility which grew up under Henry VII. and his son owed everything to the royal favour, and were restrained from independent action alike by gratitude, by interest, and by fear of the resolute vengeance which those monarchs unsparingly dealt out to all who opposed them. A watchful jealousy of all individuals likely to disturb their power was a characteristic of all the Tudor sovereigns. The nobles found safety and advancement by acting the part of courtiers rather than of parliamentary barons. "Henry VII.," says Lord Bacon, "kept a strait hand on his nobility; and chose rather to advance clergymen and lawyers, which were more obsequious to him, but had less interest in the people." The same policy was pursued by Henry VIII. and Elizabeth. The remnant of the old nobility, the Percies, Nevilles, and Howards, were disgusted at the advancement of men like Wolsey, Cromwell, Cecil, Bacon, and Walsingham. The rebellion of the Earls of Northumberland and Westmoreland, in 1569, was as much a protest against the "newe set-upp nobles," as against the "new-found religion" and the incarceration of Mary Queen of Scots, the representative of the ancient faith (*h*). At the same time the House of Commons, under the restricted franchise introduced by the Act of Henry VI., consisted largely of nominees, servants and pensioners of the crown. Under Henry VIII., government interference with elections became a common practice, and in the reigns of Edward VI., Mary, and Elizabeth, petty boroughs were

(*h*) In their proclamation the rebels justified their proceedings on the ground that the queen was surrounded "by divers newe set-upp nobles, who not onlie go aboute to overthrow and put downe the ancient nobilitie of the realme, but also have misused the queen's majestie's owne personne, and also have by the space of twelve yeares nowe past set upp and mayntayned a new-found religion and heresie contrary to God's word."—Lingard, Hist. Eng., viii. 45.

specially created in order to be corrupt. But the very fact that it was found needful to pack the House of Commons, and the anxiety which the Tudor monarchs generally displayed to secure the sanction of parliament for all their proceedings, afford the strongest testimony to the real power and importance of the national assembly. Under Elizabeth, the commons began to resume their firm tone and bearing, and thenceforth never desisted until they had won back their ancient liberties and established them on a sure foundation.

During the 120 years spanned by the Tudor dynasty, the constitutional historian has scarcely any general progress of free principles, any important measure of improvement to record (*i*). The power of the crown steadily increased until it acquired dangerous proportions; but it was usually exercised with discretion; and the want of a standing army acted as a perpetual restraint which did not indeed prevent the crown "from sometimes treating an individual in an arbitrary and even in a barbarous manner, but which effectually secured the nation against general and long-continued oppression" (*k*). In the meantime, amidst the political lethargy of the great mass of the people, a silent transfer of power was taking place. The commercial wealth of the middle classes enabled them to buy up the estates of the old landed proprietors, and

(*i*) [While calling the Tudor age the period of the "restoration of constitutional government," Gneist, Hist. Engl. Const., chap. 31, p. 462, goes yet farther: "The fundamental institutions, upon which the vital energy of the parliamentary constitution is built up, were developed and extended by the Tudors in a manner that in itself affords us sufficient proof that these monarchs sincerely desired the maintenance of the constitution. The combination of sovereign rights with the local system continued in every direction, and, striking its roots deeper down, drew the lesser units into the activity of self-government." *Cf.* also Maitland, Const. Hist., p. 237: "The Tudor monarchy is indeed something very different from the Lancastrian—the latter was a very limited monarchy; the former, if we regard its practical operation, seems almost unlimited. Still the difference, when we look into it, is found not so much in the nature of the institutions which exist as in the spirit in which they work; the same machinery of king, lords, commons, council, law courts, seems to bring out very different results."—Ed.]

(*k*) Macaulay, Hist. Eng., i. 31.

feudalism gradually died out (*l*). The persecution of the Puritans roused up a spirit of opposition to the crown, and the struggle for religious freedom led on to the vindication of political freedom also. Under Elizabeth, opposition was restrained by her personal popularity, and by the feeling that a strong government was necessary amidst the perils to which both she and the nation were exposed from the Pope, from Spain, and from France: but this forbearance ended with the advent of the House of Stuart. At the commencement of the Tudor period England was a single kingdom, distracted and impoverished by a sanguinary civil war, with Scotland as a thorn in her side, and Ireland as a disturbed dependency. At the accession of the House of Stuart, she had reached the zenith of material prosperity, and assumed the position of a United Kingdom.

HENRY VII. 1485-1509.

Checks on the royal authority.

Taxation.

The results of the protracted contest between the crown and the people during the middle ages are thus concisely summed up by Hallam, in enumerating the essential checks upon the royal authority existing at the accession of Henry VII. (1) "The king could levy no sort of new tax upon his people, except by the grant of his parliament, consisting as well of bishops and mitred abbots, or lords spiritual,

Entail.

Fines and recoveries.

(*l*) The law of strict entail established by the Statute *De Donis conditionalibus* (13 Edw. I. c. 1, called also the Statute of Westminster the Second) endured for about 200 years. But in the 12th Edw. IV. a decision of the judges in the celebrated *Taltarum's case* had restored the power of alienation by means of the collusive judicial proceeding termed a *recovery*. Another mode of barring an estate tail, though not so effectually as by a recovery, was by a *fine*, a fictitious action, commenced, and then compromised by leave of the Court, and which barred all claims on the part of the issue not made within a year and a day afterwards. This power of barring future claims was taken from fines by statute 34 Edw. III. c. 13; but it was again restored, with an extension of the time of claim to five years, by the Act 1 Ric. III. c. 7, which was re-enacted in the Statute of Fines, 4 Hen. VII. c. 24. The deep designs attributed to Hen. VII. in procuring the passing of the Statute of Fines as a means of exalting the royal authority upon the ruins of the aristocracy, have been shown by Hallam to be without foundation. (Const. Hist., i. 11.) The statute afforded, indeed, some slightly increased facilities for the alienation of land, by establishing a short term of prescription, but its efficiency as regards barring entails depended upon a judicial construction of it in the 19 Hen. VIII., confirmed by statute 32 Hen. VIII. c. 36.

and of hereditary peers or temporal lords, who sat and voted promiscuously in the same chamber, as of representatives from the freeholders of each county, and from the burgesses of many towns and less considerable places, forming the lower or Commons' House. (2) The previous assent and authority of the same assembly were necessary for every new law, whether of a general or temporary nature. (3) No man could be committed to prison but by a legal warrant specifying his offence: and by an usage nearly tantamount to constitutional right, he must be speedily brought to trial by means of regular sessions of gaol-delivery. (4) The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made (*m*). Civil rights, so far as they depended on questions of fact, were subject to the same decision. (5) The officers and servants of the crown, violating the personal liberty or other right of the subject, might be sued in an action for damages to be assessed by a jury, or, in some cases, were liable to criminal process; nor could they plead any warrant or command in their justification, nor even the direct order of the king" (*n*). To these may be added, (6) The liability of the king's ministers to be impeached by the commons for misgovernment. This constitutional right had not indeed been exercised since the reign of Henry VI. (*nn*), and lay dormant throughout the Tudor period, but it was dormant only, and with the revival of the spirit of liberty under James I. the right of impeachment was reasserted. Indeed all these securities, though undoubtedly established by law, were more or less evaded in actual practice by the violent and unconstitutional acts of the Tudor sovereigns. "The general privileges of the nation were far more secure than those of private men"; and on the whole "there was, perhaps, little effective restraint upon the government, except in the two articles of levying money and enacting laws" (*o*).

Legislation.

Personal liberty.

Trial by jury.

Legal liability of the servants of the crown.

Impeachment.

(*m*) [See *Supra*, pp. 143 *seq.*—Ed.] (*n*) Hallam, Const. Hist., i. 2.
(*nn*) [*Cf. supra*, p. 298.] (*o*) *Ibid.* i. 5.

Henry VII.'s laws.

Henry VII. has been eulogised by Lord Bacon (*oo*) as "the best lawgiver to this nation since Edward I." His laws are characterised by the same author as "deep and not vulgar, not made upon the spur of a particular occasion for the present, but out of providence for the future, to make the estate of his people still more and more happy, after the manner of the legislators in ancient and heroical times" (*p*). But this high praise is very inadequately supported by the actual facts. The laws of Henry VII. are few in number, and generally of small public interest. Only two among them—the statute for the security of the subject under a king *de facto*, and the statute by which a new court was erected reviving the authority of the Star Chamber—at all approach Lord Bacon's general description; and even these, though they had important effects in the future, evidently were enacted "upon the spur of a particular occasion"—namely, the necessity of providing for the security of his somewhat rickety throne.

Statute for the security of the subject under a king *de facto*. 1495.

By the first-named Act it was declared that "no person attending upon the king and sovereign lord of this land *for the time being*, and doing him true and faithful service, shall be convicted of high treason by Act of Parliament or other process of law, nor suffer any forfeiture or punishment; but that every Act made contrary to this statute shall be void and of no effect" (*q*). The attempt to bind future parliaments was of course nugatory: "for a supreme and absolute power cannot exclude itself; neither can that which is in its nature revocable be made fixed" (*r*). But from the passing of this statute it has been an accepted constitutional maxim that "possession of the throne gives a sufficient title to the subject's allegiance, and justifies his resistance of those who may pretend to a better right." At the trial of the regicides after the Restoration, some of them endeavoured to justify themselves under this Act by pleading that they had obeyed the government which was in possession, and were therefore not traitors. The judges, however, held that although this would have been

(*oo*) [The customary designation, though, strictly speaking, incorrect.—Ed.]

(*p*) Bacon, Life and Reign of Henry VII.

(*q*) 11 Hen. VII. c. 1.

(*r*) Bacon's Henry VII., ii. 160.

a good defence for acts done by authority of a usurping king, it would not avail to cover the proceedings of a non-regal government against one who was indicted and executed being king. At the Revolution of 1688, the provisions of the Act were much relied upon in argument as a reason for accepting William III. as king, instead of establishing a regency, as suggested by Archbishop Sancroft and certain of the tory party (*s*).

Criminal jurisdiction of the Star Chamber revived. [3 Hen VII.]

Henry's attention was early directed to the prevention of conspiracies among the adherents of the House of York, by which his throne was perpetually threatened during the earlier portion of his reign (*t*). The practice of "maintenance" by which a number of individuals associated together under some powerful nobleman, whose livery they wore and to whom they were bound by oaths and promises, for the purpose of forcibly maintaining his and their own private quarrels, afforded a ready means of raising forces at short notice to assist the claims of any pretender. Although prohibited by statute, this practice of giving liveries to numerous retainers had become general throughout the kingdom. With a view of effectually suppressing it, Henry procured the passing of the statute in the third year of his reign, by which the criminal jurisdiction of the ancient *Concilium Ordinarium* exercised in the Star Chamber was revived and transferred to a new and specially constituted court (*u*). The king's object was clearly

(*s*) See Macaulay, Hist. Eng., ii. 356, 372.

(*t*) Hatred of the House of York was with Henry VII. a passion which even political considerations of expediency could hardly control. "He never seemed to be weary," says Mr. Campbell (Materials for Hist. of Hen. VII., Roll Series, Introd. xiii.), "of branding the name of the Yorkists and their supporters with the gravest charges of rebelliousness and want of patriotism; and we shall see that the name of the late king is never mentioned by him without the favourite iteration of king 'in dede but not in right.' The state scriveners seemed to have received a standing order to introduce this hateful formula into every paper connected with Richard's name, however insignificant."

(*u*) See *supra*, p. 167. ["A disastrous error has been committed by modern historians, and in particular by Hallam, in portraying the character of this royal Council as a disciplinary, controlling and appeal court, in the light of attacks and encroachments by the Privy Council. This notion is perfectly foreign to contemporary historians, parliamentarians and jurists; it is rather the result of a dating back of conditions belonging to the eighteenth century. When Lord Coke (Inst. iv. 17) declares the extension of 'punishment' of disobedient magistrates in stat. 4 Hen. VII.

explained to the parliament by Morton, Archbishop of Canterbury, speaking on his behalf: "His Grace (*i.e.*, the king) saith, that it is not the blood spilt in the field that will save the blood in the city; nor the marshal's sword that will set this kingdom in perfect peace; but that the true way is to *stop the seeds of sedition and rebellion* at the beginning, and for that purpose to devise, confirm and quicken good and wholesome laws against riots and unlawful assemblies of people, and all combinations and confederacies of them by liveries, tokens, and other badges of factious dependence; that the peace of the land may, by these ordinances, as by bars of iron, be soundly bound in and strengthened, and all force, both in court, country, and private houses, be suppressed" (*w*).

Exactions of Henry VII.

Henry VII. has been reproached with his insatiable avarice, but it is improbable that he amassed money merely for its own sake. As a clever and unscrupulous political adventurer, who had taken advantage of the disturbed state of the kingdom, after an exhausting and protracted civil war, to seize the throne by the aid of the Lancastrian faction, he had learnt the value and power of money as a means of buying future, and rewarding past, support. Taxation, moreover, was the one point which the mass of the people seemed to have considered worth fighting about. Twice during his reign, when several subsidies were granted, formidable insurrections broke out: in 1488 in the north, under John à Chambre and Sir John

Insurrections.

to be a natural presupposition of the ordinary course of law in an action this was a pious wish of the honourable lord chief justice, which could not be enforced against the Privy Council, and of the fulfilment of which no instance is known."—Gneist, Hist. Engl. Const., p. 533, note. In the same sense, also, Maitland, Const. Hist., p. 262, who remarks: "Now, was this the court created by the Statute of Henry VII? Under Charles I. the opinion had gained ground that it *was*, that consequently whatever it did beyond the sphere marked out by that statute was an unlawful usurpation of jurisdiction. When the time for abolishing it had come, it was abolished on this score. But the general opinion now seems to be that the jurisdiction of this court of Star Chamber was in truth the jurisdiction which the King's Council had exercised from a remote time, despite all protests and all statutes made against it."—Ed.]

(*w*) Bacon's Henry VII. The speech of Morton is not found in the Rolls of Parliament, and was possibly invented by Bacon as representing what he considered ought to have been said. In any case, it accurately expresses the object of the statute passed.

Egremont; in 1497 in Cornwall, under Thomas Flammock, an attorney, and Michael Joseph, a farrier, who, with 16,000 followers, marched as far as Blackheath in Kent, and, having been joined by Lord Audley, engaged the king's troops, surrendering only after the loss of 2,000 killed, and 1,500 made prisoners (*x*). Hence Henry deemed it politic to squeeze money out of the rich, and to avoid general impositions affecting the poorer classes. He first had recourse to benevolences, which, as we have seen, had been abolished in Richard III.'s only parliament as an intolerable grievance (*xx*). A benevolence extorted by the king in the seventh year of his reign, received, four years later (1492), a kind of parliamentary sanction by "a shoring or under-propping Act," making legally payable, under pain of imprisonment, the arrears which private individuals had promised but not brought in (*y*). The inquisitorial and arbitrary nature of the exaction appears from the statement of Lord Bacon that "there was a tradition of a dilemma that Bishop Morton the Chancellor used, to raise up the benevolence to a higher rate; and some called it his fork, and some his crotch. For he had couched an article in the instructions to the commissioners who were to levy the benevolence, that if they met with any that were sparing, they should tell them that they must needs have, because they laid up: and if they were spenders, they must needs have, because it was seen in their port and manner of living; so neither kind came amiss" (*z*). In addition to benevolences Henry extorted large sums by suing for penalties under obsolete statutes, by rigorously exacting the extreme feudal rights of the crown, and by employing the various processes of the courts of law, not for the dispensation of justice, but for the accumulation of fines and penalties. During the latter part of his reign he made use, for this purpose, of the notorious Richard Empson and Edmund Dudley, "lawyers in science and privy councillors in authority, who turned

Benevolences.

Other modes of raising money.

(*x*) Lingard, Hist. Eng., v. 299, 314.
(*xx*) [*Supra*, p. 340.]
(*y*) 11 Hen. VII. c. 10.
(*z*) Bacon, *op. cit.*, p. 121. [Claimed for Bp. Fox, Notes and Queries. 7th S. ix.; 443.—Ed.]

law and justice into wormwood and rapine" (*a*). At the accession of Henry VIII. they were both committed to prison, tried, and executed, on a frivolous charge of treason. But, while sacrificing to popular resentment the agents of his father's extortions, the new king was careful to retain the fruits of their iniquity in his treasury (*b*).

Parliament seldom summoned by Henry VII.

Throughout his reign of twenty-four years Henry VII. summoned parliament only seven times, and during the last thirteen years only once, in 1504. To obtain money was the object on each occasion; but, like his predecessors, be submitted the expediency of his wars to the consideration and advice of the national council. His first parliament had granted him the duties on tonnage and poundage for life (*c*), and the wealth which he amassed by the various means already referred to, by the attainder of the most opulent of the Yorkists, and by revocation, on his own sole authority, of all crown grants made since the 34 Henry VI. (1454-5), rendered him the richest prince in Christendom, and thus practically independent of parliamentary control.

HENRY VIII. 1509-1547.

The peculiar characteristics of Henry VIII.'s reign—the subservience of parliament, the real despotism of the king thinly disguised under parliamentary and judicial forms, the fair words uttered, the foul deeds done—have been already referred to (*cc*). On one point only—taxation—do we meet with an exception alike to the general servility of parliament and to the general regard of the king for constitutional formalities.

Taxation.

Henry's first parliament granted him tonnage and poundage for life; but with a proviso "that these grants be not taken in example to the kings of England in time to come" (*d*). Liberal subsidies were granted by the four following parliaments for the prosecution of the war with France; but, in 1523, Wolsey took the indiscreet step of going to the House of Commons, and personally urging

Wolsey's attempt to intimidate the commons.

(*a*) Bacon's Henry VII., p. 217.

(*b*) In order to conciliate the nation, an Act (1 Hen. VIII. c. 3) was passed to correct the abuses which had prevailed in finding the king's title to land by escheat, and providing that all suits on penal statutes should be commenced within three years after the time of the alleged offence.

(*c*) Rot. Parl., 1 Hen. VII.

(*cc*) [*Supra*, pp. 344, 345.]

(*d*) 1 Hen. VIII. c. 20.

the grant of £800,000, an unprecedented sum, to be raised by a property tax of 20 per cent. on lands and goods. Many members were inclined to resist his admission into the House, his presence there being evidently calculated to intimidate the members, and thus silence all opposition. It was resolved, however, to admit him, and on the suggestion of Sir Thomas More, the Speaker, not with a few followers only, but "with all his pomp, with his maces, his pillars, his pole-axes, his cross, his hat, and the great seal too." The cardinal made a long and eloquent oration in favour of joining the Emperor Charles V. in a war against France, and urged the grant of the sum demanded as the estimated cost of the expedition. But all the independent members opposed a vigorous resistance. Wolsey came down to the House a second time, but the commons received his harangue with silence; "and when the minister demanded some reasonable answer, every member held his peace. At last the Speaker, falling on his knees, with much reverence excused the silence of the House, abashed, as he said, at the sight of so noble a personage, who was able to amaze the wisest and most learned men in the realm: but with many probable arguments he endeavoured to show the cardinal that his coming thither was neither expedient, nor agreeable to the ancient liberties of that house" (*e*), it being the usage of the commons to debate only amongst themselves. After fifteen days' debate, a subsidy much inferior in amount to that which the cardinal had demanded, and payable by instalments in four years, was at length granted, mainly through the influence of the servants and dependants of the crown holding seats in the House. "I beseke Almightie God," wrote a member of the commons to the Earl of Surrey, "it may bee well and peasibly levied, and surely payed unto the king's grace, with oute grudge, and specially with oute losyng the good wills and true herts of his subjects which I rekene a ferre grettir treasure for a king then gold or silver. And the gentilmen which muste take paynes to levy this money among the king's subjects, I think shalhave no little besynes about the

(*e*) Moore, Life of Sir T. More.

same" (*f*). This manifestation of an independent spirit among some of the commons' House was agreeable neither to the king nor the cardinal; and for nearly seven years parliament was not again summoned.

Forced loans and benevolences.

In the meantime recourse was had to forced loans and benevolences. A forced loan had been already exacted in 1522, every man being required to swear to the value of his possessions, and to contribute a rateable portion according to such declaration, on the king's promise of repayment out of the next subsidy granted by parliament (*g*). In 1525, soon after the news of the battle of Pavia had been received, fresh commissioners were appointed with instructions to demand the sixth part of the goods of the laity and the tenth part of the goods of the clergy, on the pretext that the king was about to lead an army into France. This demand was unanimously resisted. The mayor and citizens of London on attempting to remonstrate were warned to beware, lest "it might fortune to cost some their heads." The clergy boldly stood upon their privilege to grant money only in convocation; asserting that the commission was contrary to the liberties of the realm, inasmuch as the king could take no man's goods without the authority of parliament. By preaching and example they animated the people to resistance. "When this matter was opened through Englande," says the old chronicler Hall, "howe the greate men toke it was maruell, the poore cursed, the rich repugned, the light wittes railed, but, in conclusion, all people cursed the cardinal, and his coadherentes as subversor of the lawes and libertie of Englande. For thei saied, if men should geue their goodes by a commission, then wer it worse than the taxes of Fraunce, and so England should be bond and not free."

(*f*) Ellis, Letters illustrative of English history, i. 221.

(*g*) The form of these "privy seals," as the king's promises of repayment were called, ran: "We Henry VIII., by the grace of God, King of England and of France, Defender of Faith, and Lord of Ireland, promise by these presents truly to content and repay unto our trusty and well-beloved subject, A. B., the sum of ————, which he hath lovingly advanced unto us by way of loan, for defence of our realm, and maintenance of our wars against France and Scotland: In witness whereof we have caused our privy seal hereunto to be set and annexed the ———— day of ————, the fourteenth year of our reign."—MS. Instructions to the Commissioners, cited in Hallam, Const. Hist., i. 19.

The royal commissioners being forcibly resisted in several counties, and a serious insurrection having broken out in Suffolk, Henry was at length obliged to annul the obnoxious commission, and "the demaunde of money seased in all the realme, for well it was perceiued that the commons should none paie" (*gg*).

The forced loan having failed, recourse was now had to the more specious demand for a voluntary benevolence. This being objected to by the citizens of London, as illegal under the statute of Richard III., the judges were consulted, and gave answer that the statute, as the work of an usurper, was not binding on a lawful sovereign.

In 1544 another forced loan was exacted from all persons rated at £50 per annum: and in the following year a general benevolence from all persons having land to the annual value of 40s., or chattels worth £15. The commissioners were instructed that "if any one should withstand their gentle solicitations, alleging either poverty or some other pretence which the commissioners should deem unfit to be allowed, then, after failure of persuasions and reproaches for ingratitude, they were to command his attendance before the Privy Council, at such time as they should appoint, to whom they were to certify his behaviour, enjoining him silence in the mean time, that his evil example might not corrupt the better disposed" (*h*). The consequence of refusing to contribute may be learnt from the oppressive treatment of two aldermen of London, Richard Reed and Sir William Roach. Reed was sent down to serve as a common soldier on the Scottish border, where the English army was then in the field, with special instructions to the general to employ him on the hardest and most perilous duty, and to "use him in all things according to the sharpe disciplyne militar of the northern wars" (*i*). Having been taken prisoner in the first engagement, the unhappy alderman was compelled to pay much more for his ransom than the benevolence required of him. Sir William Roach received

(*gg*) Hall, 696, 700.
(*h*) Lodge, Illustrations of British History, i. 711: Hallam, Const. Hist., i. 24.
(*i*) Lodge, Illustrations, p. 180.

the milder punishment of imprisonment for three months, on a charge of uttering seditious words (*k*).

The king released from his debts by Act of Parliament.

The forced loans were nominally secured, as we have seen, by the king's promises of repayment; but even this shadowy hope of reimbursement was taken away by the Acts of a servile parliament. On two occasions the king was formally released from his debts. In 1529 a statute was passed by which the parliament, "for themselves and all the whole body of the realm which they represent, freely, liberally, and absolutely, give and grant unto the king's highness, by authority of this present parliament, all and every sum and sums of money which to them and every of them is, ought, or might be due, by reason of any money, or any other thing to his grace at any time heretofore advanced or paid by way of trust or loan, either upon any letter or letters under the king's privy seal, general or particular, letter missive, promise, bond, or obligation of repayment, or by any taxation or other assessing by virtue of any commission or commissions, or by any other mean or means, whatever it be, heretofore passed for that purpose" (*l*). When this release of the loan, Hall tells us, "was knowen to the commons of the realm, lorde so they grudged, and spake ill of the hole Parliament; for almoste euery man counted it his dette, and reconed surely of the payment of the same, and therefore some made their wills of the same, and some others did set it ouer to other for debt, and so many men had losse by it, which caused them sore to murmur, but ther was no remedy" (*m*). Again, in 1544, just after the exaction of a fresh loan, an Act was passed granting to the king all sums borrowed from any of his subjects since 1542, with a further provision that any money which his Majesty should have already paid in discharge of these debts should be refunded by the creditor or his heirs (*n*).

New treasons created by statute.

Under Henry VIII., the offence of high treason was vexatiously and wantonly extended far beyond the limits marked out by the ancient statute of Edward III. It was

(*k*) Lingard, vi. 347.
(*l*) 21 Hen. VIII. c. 24.
(*m*) Hall, 767.
(*n*) 25 Hen. VIII. c. 12.

made treason to dispute, and afterwards to maintain, the validity of the king's marriage with Anne Boleyn, or the legitimacy of her daughter Elizabeth. It was declared treason to marry without the royal licence, or have a criminal intercourse with any of the king's children "lawfully born, or otherwise commonly reputed to be his children, or his sister, aunt, or niece": or for any woman to marry the king himself, unless she were chaste, or had previously revealed to him her former incontinence. It was treason to wish by words to deprive the king of his title, name, or dignity (including the title of supreme head on earth of the Church of England); to call the king a heretic, or schismatic, openly to wish him harm, or to slander him, his wife, or his issue (*o*). The guilt of treason was even extended from deeds and assertions to the very thoughts of men. It was incurred "by any person who should by words, writing, imprinting, or any other exterior act, directly or indirectly accept or take, judge, or believe, that either of the royal marriages, that with Catherine or that with Anne Boleyn, was valid, or who should protest that he was not bound to declare his opinion, or should refuse to swear that he would answer truly such questions as should be asked him on those dangerous subjects" (*p*). "It would be difficult," says Lingard, "to discover, under the most despotic governments, a law more cruel and absurd. The validity or invalidity of the two marriages was certainly matter of opinion, supported and opposed on each side by so many contradictory arguments, that men of the soundest judgment might reasonably be expected to differ from each other. Yet Henry by this statute was authorised to dive into the breast of every individual, to extort from him his secret sentiments upon oath, and to subject him to the penalties of treason, if those sentiments did not accord with the royal pleasure" (*q*).

The Earl of Warwick, only son of the Duke of Clarence, brother of Edward IV.: the Earl of Suffolk, nephew of

(*o*) 25 Hen. VIII. c. 22; 26 Hen. VIII. c. 13; 28 Hen. VIII. c. 18; 32 Hen. VIII. c. 25; 33 Hen. VIII. c. 21.
(*p*) 28 Hen. VIII. c. 7; Lingard, vi. 372.
(*q*) Hist. Eng., vi. 372.

that king; the Duke of Buckingham, also of royal descent and the first in rank and consequence among the nobility; the aged Countess of Salisbury, daughter of Edward IV. and mother of Cardinal Pole; Queen Anne Boleyn; Bishop Fisher; Sir Thomas More; Thomas Cromwell; the Earl of Surrey; and the Duke of Norfolk, ordered for execution but saved by the opportune death of the king, were among the most conspicuous victims to Henry's ferocious vengeance, policy, or caprice. The forms of law became the engines for the perpetration of judicial murders; the most trivial evidence was regarded as sufficient to support a conviction for treason; and during the latter part of Henry's reign even the few advantages which the accused possessed in the ordinary courts were taken away by the habitual employment of bills of attainder.

Bills of attainder.

A bill of attainder differs from an impeachment thus: Impeachment is a judicial proceeding in which the commons, "the most solemn grand inquest of the whole kingdom," are prosecutors, supporting their accusation by evidence, and the lords are the sole judges. Attainder is a legislative act, which must pass through the same stages as any other Act of Parliament. It may be introduced in either the lords or commons, and after passing through both Houses receives the royal assent. No evidence is necessarily adduced to support it. It is analogous to a bill of pains and penalties, and was originally intended for the punishment of those who fled from justice. The earliest notable instance of its employment was in the banishment by parliament of the two Despencers, father and son, in the 15th Edward II., A.D. 1321 (*r*).

Accused persons not heard in their defence.

To obviate all danger of refutation or of unpleasant disclosures, Cromwell, by the king's express command, inquired of the judges whether, if parliament should condemn a man to die for treason without hearing him in his defence, the attainder could ever be disputed. They replied that it would form a dangerous precedent; that parliament should rather set an example to inferior courts by proceeding according to justice; but that the court of

(*r*) Proceedings against the Despencers, 1 St. Tr., 23, 138. See *supra*, p. 299, note (*f*).

parliament being supreme, an attainder in parliament could never, under any circumstances, be subsequently questioned in a court of law (*s*). By the irony of fate, Cromwell was himself the first to perish by an Act of attainder hurried through parliament without hearing him in his defence.

Act giving the king's proclamations the force of law.

A remarkable example of the way in which Henry VIII. contrived to unite the exercise of practically absolute power with respect for constitutional forms to play the despot by the co-operation of his parliament—is afforded by the Act giving the king's proclamations the force of law. The king having issued certain royal proclamations, the judges held that those who disobeyed them could not be punished by the Council. The king then appealed to parliament to give to his proclamations the force of statutes. This request was complied with, but not without "many large words." The Act recites the contempt and disobedience of the king's proclamations by some "who did not consider what a king by his royal power might do," and then, in order "that the king might not be driven to extend his royal supremacy," enacts that proclamations made by him, with the advice of a majority of his Council, should, under the penalty of fine and imprisonment, have the force of statutes, but so that they should not be prejudicial to any person's inheritance, offices, liberties, goods and chattels, or infringe the established laws. It was, moreover, specially declared that such proclamations should derive all their force "from the authority of this Act," and that no persons should "by virtue of this Act suffer any pains of death"; but from this provision against capital punishment there was a formidable exception of such persons as "should offend against any proclamation to be made by the king's highness, his heirs or successors, for or concerning any king of heresies against Christian doctrine" (*t*). The fact that the king was obliged to obtain this statute, and the considerable limitations with which it was granted, afford "a striking testimony to the free constitution it infringed, and demonstrate that the

(*s*) Coke, Inst., iv. 37
(*t*) 31 Hen. VIII. c. 8.

prerogative could not soar to the heights it aimed at, till thus impelled by the perfidious hand of parliament" (*u*).

The crown's assumption of the ecclesiastical supremacy.

We have seen how the despotism of Henry was rendered possible by the decay and intimidation of the nobility and by the obsequiousness of the commons. His arbitrary rule was still further augmented by the assumption of the ecclesiastical supremacy, and the practical transfer to the crown of the immense power which the church had hitherto wielded. The dissolution of the monasteries not only supplied Henry with vast wealth with which to bribe the temporal peerage into implicit conformity with his will, but at the same time by depriving twenty-six parliamentary abbots and two parliamentary priors of their seats in the House of Lords, reduced, from a majority to a minority, the spiritual peerage, who alone were likely to be sufficiently independent to offer a serious opposition (*w*). The religious disputes of the Reformation also contributed in no small degree to sustain the influence of the crown. The two great parties into which the nation was divided were too jealous of each other, too intent upon winning the favour of the king in order to crush their adversaries, to offer any real resistance to the encroachments of royal power.

Popularity of Henry VIII.

Notwithstanding his many vices, Henry VIII. was on the whole popular with the mass of his subjects. The times were peculiarly favourable for the exercise of a strong paternal government. Henry secured to the people that domestic peace for which they so ardently longed; and recognising the spirit of the age as antagonistic to the tyranny of the church, wisely headed the movement, and adroitly made use of it to secure his own personal

(*u*) Hallam, Const. Hist., i. 35. By the Act of 31 Hen. VIII. c. 8, transgressors against the king's proclamations were to be tried and punished by certain persons enumerated therein, consisting of the usual officers of the Privy Council, together with some bishops and judges, "in the star-chamber and elsewhere." The prescribed number proving inconveniently large, another Act was passed in 1544 (34 Hen. VIII. c. 23) by which the jurisdiction was given to a tribunal of nine privy councillors.

(*w*) In the parliament which met, after the dissolution of the monasteries, in 1539, there were present 41 temporal peers and only 20 spiritual peers.—Henry, Hist. Eng., xii. 151. To the 21 old bishoprics Henry VIII. subsequently added 6 new ones—Westminster, suppressed in 1550, Bristol, Chester, Gloucester, Oxford, and Peterborough, which still exist.

ends, and to establish the tyranny of the crown. His wars were uniformly successful, and if the maintenance of the balance of power between the Emperor Charles V. and Francis I. of France was productive of no material advantage, it flattered the pride of the English people, and exalted them in the estimation of the European nations. During the earlier portion of his reign at least he displayed a frank, affable, and generous temper: he was no mean scholar: expert in all manly exercises: of noble presence and elegant bearing: and he at all times devoted a large portion of time to the arduous duties of personal government. Amidst the perils and dangers, foreign and domestic, to which the nation was on several occasions exposed during Henry's reign, men felt that in him they possessed an able, vigorous, and thoroughly national administrator (*x*).

Consolidation of the kingdom.

Wales.

The consolidation of the kingdom with respect to both Wales and Ireland was considerably advanced under Henry VIII. By the *Statutum Walliae* (12 Edward I., A.D. 1284) the land of Wales and its inhabitants, theretofore only feudally subject to the kings of England, had been wholly annexed and united to the English Crown. But, although many material alterations were at the same time made in the Welsh laws, the conquered people still retained several provincial immunities and disabilities. They preserved their ancient rule of inheritance, similar to the English gavelkind, by which lands were divided equally among all the issue male, instead of descending to the eldest son alone: but on the other hand, with the exception of two parliaments of Edward II. in 1322 and 1326, to which twenty-four members were summoned as representatives of South, and other twenty-four as representatives of North Wales (*y*), the Welsh people had continued without any representation in the House of Commons. By the statute 27 Henry VIII. *c.* 26 (1536), Wales was thoroughly incorporated into and united with

(*x*) For all that can possibly be said in Henry VIII.'s favour see Froude, Hist. Eng., vols. i.—iv. It is unnecessary, in order to recognise the abilities and greatness of Henry, that we should, with Mr Froude, regard him as a virtuous and beneficent ruler, which he certainly was not.

(*y*) Rymer, ii. 484, 649; Lingard, iii. 328.

England; all persons born in the principality were admitted to enjoy and inherit all the freedoms, liberties, rights, privileges and laws of England; and lands in Wales were declared to be inheritable after the English tenures and rules of descent. By a subsequent statute (34 & 35 Henry VIII. c. 26), Wales was divided into twelve counties (*z*), each empowered to send one knight to parliament; and every borough, being a shire town, was to send one burgess. In the same year (1543), the County Palatine of Chester was admitted to parliamentary representation, two knights for the county and two burgesses for the city of Chester (*a*).

Ireland.

During the Wars of the Roses, the authority of the English crown over Ireland had sunk to a very low ebb. At the accession of Henry VIII. his rule was practically limited, with the exception of the principal seaports, to the English pale, consisting of the eastern half of the five counties of Louth, Meath, Dublin, Kildare, and Wexford. The western half of these counties was a march land, more disorderly, if possible, than the rest of the island, which was divided among a large number of petty chieftains, mainly of Irish but partly of English origin, who governed the inhabitants of their respective territories and made war upon each other with the freedom of independent princes. Under the strong government of the Tudor kings the English ascendancy in Ireland was re-asserted and placed upon a firmer basis than it had occupied since the days of Henry II. In the contest between the rival houses of York and Lancaster, the Anglo-Irish had for the most part espoused the cause of the White Rose, and they

(*z*) This was exclusive of Monmouthshire, which, though formerly part of Wales, had been made, by the 27 Hen. VIII. c. 26, before mentioned, one of the counties of the realm of England, and as such entitled to return two knights of the shire to parliament. Under the statute 34 & 35 Hen. VIII. c. 26 (1542-1543), superior courts of justice called courts of Great Session were established, with a jurisdiction independent of the process of Westminster Hall. These continued to administer law and equity in civil cases, and also criminal matters arising within the principality, down to the year 1830, when the courts were abolished by statute (1 Will. IV. c. 70), and it was enacted that assizes should be held in the principality for the trial of all matters criminal and civil in like manner and form as had been usual for the counties in England.

(*a*) 34 & 35 Hen. VIII. c. 13.

readily gave their support to the two pretenders who successively put in jeopardy the throne of Henry VII. (*b*). It was with the view of reducing to subjection the settlers within the pale, that in 1495 was passed the celebrated Poynings' Law, as the statute of Drogheda was styled from Sir Edward Poynings, the deputy of young Henry, Duke of York (afterwards Henry VIII.), who at the age of four years had been appointed lord lieutenant of Ireland. This statute contained a variety of provisions for restraining the power of the great lords within the pale, and strengthening the royal authority. Its two most important enactments were: (1) All statutes "lately made in England and belonging to the public weal of the same" should have the force of law in Ireland. (2) No parliament should in future be holden in Ireland till the king and his Council had been informed by the lieutenant of the necessity of the same, and of the Acts proposed to be passed in it, and the royal licence and approbation had been previously obtained. By securing the initiative power to the king and his English Council, a check was placed upon the action of every Irish parliament, and upon the lord-deputies, sometimes powerful Irish nobles "whom it was dangerous not to employ, but still more dangerous to trust." "Whatever might be its motive," says Hallam, "it proved, in the course of time, the great means of preserving the subordination of an island, which, from the similarity of constitution, and the high spirit of its inhabitants, was constantly panting for an independence which her more powerful neighbour neither desired nor dared to concede" (*c*).

Poynings' Law, 1495.

The stern and systematic despotism of Henry VIII., coupled with the intimidation produced by his relentless vengeance against the powerful family of Fitzgerald, had still greater effect in reviving the royal authority. From a lordship, the title which it had hitherto borne under the successors of Henry II. Ireland was [restored] to the

(*b*) Lambert Simnel was undoubtedly an impostor. It is a question of much uncertainty who the young man really was who called himself Richard, Duke of York, son of Edward IV., and who is generally styled by historians Perkin Warbeck. The evidence is not conclusive either way, but the balance seems to incline in favour of his pretensions.

(*c*) Const. Hist., iii. 362.

higher rank of a kingdom (*d*); the native chiefs came in and submitted; peerages were sought and obtained, not only by the Anglo-Irish, but by some of the most powerful of the old Irish families (*e*): and although still far from secure, the English government in Ireland assumed during the last years of Henry VIII. a much more settled aspect than it had borne for very many years previously.

EDWARD VI., 1547-1553. *MARY.* 1553-1558.

The ecclesiastical changes under Edward VI. and Mary, as well as those effected by Henry VIII., will be treated of in the succeeding chapter on the "Reformation in England." In their civil aspect the reigns of Edward VI. and Mary were scarcely, if at all, less despotic than that of their father, although we shall see some signs that the House of Commons was beginning to recover a little of its ancient independence. The youth of Edward VI. precluded him from exercising any but a very slight influence upon affairs, the royal power being practically vested first in the protector Somerset and afterwards in John Dudley, Duke of Northumberland.

New treasons abolished.

One of the first acts of the young king's advisers was to endeavour to propitiate the nation by abrogating some of the sanguinary and unconstitutional laws of Henry VIII. By a statute of Edward's first parliament all new treasons and felonies created during the last reign were abolished: and the Act of Edward III. again became the standard of high treason, except that to affirm in words of writing that the king was not, or that the pope was head of the church, still remained a treasonable offence (*f*).

But are re-enacted in 1552.

In 1552, however, after the fall of Somerset, many of the treasons created under Henry VIII., and abolished by this statute, were re-enacted, together with some new ones (*g*). But in this parliament the commons exhibited an unwonted independence, and zeal for liberty and justice. They threw out the bill as originally framed by the ministers,

(*d*) Henry assumed the style of King of Ireland, January 23, 1542, under an Irish Statute, 33 Hen. VIII. c. 1. The change was confirmed in 1544 by an English Act of Parliament, 35 Hen. VIII. c. 3.

(*e*) William Birmingham was created Lord Carbery in 1514; Con O'Neill and his son Matthew, respectively Earl of Tyrone and Lord Dungannon, in 1542; Morogh O'Brien was made Earl of Thomond, Ulick de Burgh, Earl of Clanricarde, and Donough O'Brien, Lord Ibracken, in 1543.

(*f*) 1 Edw. VI. c. 12 [*Cf. supra*, p. 256, note (*h*), and *infra*, pp. 372 *seq.*]

(*g*) 5 & 6 Edw. VI. c. 11.

and substituted one of a much more moderate nature, in which was embodied what has been justly described as "one of the most important constitutional provisions which the annals of the Tudor family afford" (*h*). The constant complaint of persons accused of treason, that they could not establish their innocence because never confronted with their accusers, had brought home to the public mind the iniquity of the usual method of procedure. It was now enacted that no person should in future be indicted or attainted for any manner of treason except on the testimony of two lawful witnesses, who should be brought face to face with the accused at the time of his trial, unless he should willingly confess the charges. Although shamelessly evaded, or utterly disregarded in the state trials under Elizabeth and James I., this salutary statute was ultimately recognised, when all ranks and parties had learnt moderation in the school of adversity, as the foundation of a rule of procedure which has afforded to the subject "a mighty safeguard against oppressive prosecutions" (*i*).

Repeal of the Act giving the king's proclamations the force of law.

The same Act of Edward's first parliament which repealed the new-made treasons of Henry VIII., repealed also the statute which had given to that monarch's proclamations the force of law. But this made little practical change with regard to royal proclamations. Several were issued during Edward's reign, enforced by penalty of fine and imprisonment; and by one issued in 1549, all justices of the peace were commanded to arrest "sowers and tellers abroad of forged tales and lies," and to commit them to the galleys, there to row in chains as slaves during the king's pleasure (*k*). The same practice was continued under Mary, who in the last year of her reign went so far as to issue a proclamation, which, after denouncing the importation of books filled with heresy and treason from beyond sea, declared that whosoever should be found to have such books in his possession should be reputed and taken for a rebel, and executed according to martial law (*l*).

But illegal proclamations still continued to be issued.

(*h*) Hallam, Const. Hist., i. 40.

(*i*) Foster, Crown Law, 238.

(*k*) Strype, ii. 149; Hallam, Const. Hist., i. 38.

(*l*) Strype, iii. 459; Hallam, Const. Hist., i. 43. There was some excuse for this arbitrary proceeding in the fact that a violent libel had recently

Insurrections in 1549.

The year 1549 was remarkable for the tumults and insurrections of the common people which arose in many counties. In Cornwall and Devonshire under Humphrey Arundel, and in Norfolk under Ket, the risings assumed formidable dimensions, and were suppressed with some difficulty. They arose partly from opposition to the reformed doctrines, but mainly from discontent at the proceedings of the landowners, who, regardless of the ancient commonable rights of their tenants, made large enclosures of the waste or common lands of manors; and, experience having shown that the growth of wool was more profitable than that of corn, converted the arable land into pasture. This strictly commercial mode of dealing with their estates was especially adopted by the newly-made nobles and gentry who had acquired a large share of the confiscated abbey lands, and both they and the reformed religion which they professed became objects of hatred to the thousands of agricultural labourers whom the restriction of tillage had thrown out of employment, and the cultivation of commons had deprived of one great source of support (*m*). For the sup-

been written at Geneva by Goodman, a refugee, inciting the people to dethrone the queen; and that, in 1557, Sir Thomas Stafford, a grandson of the Duke of Buckingham beheaded by Henry VIII., had sailed from Dieppe with the connivance of the French king, and landing at Scarborough with a small force had vainly endeavoured to raise the people in rebellion against "the most devilish devices of Mary, unrightful and unworthy queen." (Strype, iii. 259-262.)

(*m*) "Parallel to the religious Reformation, social changes of vast importance were silently keeping pace with it. In the break-up of feudal ideas the relations of landowners to their property and their tenants were passing through a revolution; and between the gentlemen and the small farmers and yeomen and labourers were large differences of opinion as to their respective rights. The high price of wool and the comparative cheapness of sheep farming continued to tempt the landlords to throw their plough lands into grass, to amalgamate farms, and turn the people who were thrown out of employment adrift to shift for themselves. The commons at the same time were being largely enclosed, forests turned into parks, and public pastures hedged round and appropriated. Under the late reign these tendencies had with great difficulty been held partially in check; but on the death of Henry they acquired new force and activity. The enclosing, especially, was carried forward with a disregard of all rights and interests, except those of the proprietors." Froude, Hist. Eng., v. 107. "It is the common custom with covetous landlords to let their housing so decay that the farmers shall be fain for small regard or coin to give up their leases, that they, taking the ground into their own hands, may turn all into pasture. So now old fathers, poor widows, and young children lie begging in the streets." Sermon of Lever in Strype's Memorials.

pression of these risings in future, a very severe Act was passed by parliament against unlawful and rebellious assemblies, by which it was declared to be treason for any twelve persons to meet together on any matter of state, and felony if the object of the assembly was to destroy enclosures (*n*).

Act against unlawful assemblies.

Independently of the sanguinary religious persecutions of Mary's reign, her civil government was characterised by much violence and arbitrariness. Reference has already been made to her proclamation ordering the possessors of heretical and seditious books to be executed by martial law. Her zeal for the restoration of the Roman Catholic religion caused her to anticipate the authority of parliament in her dealings with the clergy and the services of the church which she found legally established at her accession. She followed the example of her predecessors in extorting loans from her subjects (*o*). She imposed a duty upon foreign cloth without the assent of parliament; and illegal modes of punishment, the torture especially, are "more frequently mentioned in her short reign than in all former ages of our history put together" (*p*).

Violence of Mary's reign.

In 1557, a commission was issued to Bishop Bonner and others authorising them to inquire rigorously concerning "devilish and clamorous persons" who spread seditious reports or brought in heretical and seditious books, or neglected or contemned the ceremonies of the church, and in some instances to fine, imprison, or "otherwise punish" the guilty; in others of a graver nature to remit them to the spiritual courts. It was feared at the time that this proceeding was a preliminary to the establishment of the inquisition; it proved, in fact, to be the precursor of the High Commission Court of the next reign (*q*).

(*n*) 3 & 4 Edward VI. c. 15.

(*o*) In the directions to the Commissioners for a forced loan in 1557 they are informed that should any persons be "froward" they were to be compelled to find sureties to appear before the Privy Council when called on, or else to be arrested on the spot and sent to London. £110,000 was collected under this commission, in spite of outcry and resistance. Commission for the Loan, State Papers, Mary, Domestic, vols. xi. xii., cited in Froude, Hist. Eng., v. 486.

(*p*) Hallam, Const. Hist., i. 42.

(*q*) Burnet, ii. 256; iii. 243.

The violence of Mary's reign is in curious contrast with the humane and enlightened sentiments enunciated in the preamble of the first Act upon her statute-book (*r*). Like her immediate predecessor, Mary began her reign by a statute repealing all new treasons and felonies, although, as in his case, new treasons were very soon again introduced. In the preamble of the abolishing statute it is recited "that the state of a king standeth more assured by the love and favour of the subject towards the sovereign, than in the dread and fear of the laws made with rigorous pains and extreme punishment"; and that "laws made without extreme punishment are more often obeyed than laws made with extreme punishment."

Powers of a queen regnant.

Mary was the first queen regnant of England (for it is unnecessary to take into account the nine days' usurpation of the unfortunate Lady Jane Grey) (*s*): and some doubts were at one time started as to her constitutional powers. Some of the reformed preachers even went so far as to contend that the government of a woman was both prohibited by the word of God, and unrecognised by the laws of the land, which conferred no authority upon queens. On the other hand a silly book was written to exalt Mary's prerogative, on the pretence that as queen she was not bound by the laws of former kings. Mary showed her contempt for this sophism by herself throwing the book into the fire. But to set all questions at rest an Act was passed to declare that "the royal power and dignities vested in a queen the same as in a king," and that all statutes in which a king was named applied equally to a queen (*t*).

Reviving independence of the commons;

Under Henry VIII. there is only one instance, in 1532, when the commons refused to pass a bill recommended by the crown. But under Edward VI. and Mary, they on several occasions rejected bills sent down from the Upper House; and we have seen how they insisted upon the inser-

(*r*) 1 Mary, c. 1, an Act to "repeal and take away treasons, felonies, and cases of praemunire."

(*s*) After the capture of King Stephen at the battle of Lincoln, in February, 1141, the Empress Matilda was elected "*Domina* Angliae" on April 8 following; but although she held courts and issued charters in royal form, she never succeeded in making good her claim to the crown.

(*t*) 1 Mary, sess. 3, c. 1.

tion of the Act of Edward VI. creating new treasons, of the provisions requiring proof of the offence by the testimony of two witnesses in open court.

Met by the creation of rotten boroughs and by influencing the elections.

These indications of reviving independence on the part of some of the commons were met by the creation of rotten boroughs and by the direct interference of the crown in elections. Edward VI. created or restored twenty-two boroughs, of which at least half, including seven in Cornwall, were places of no kind of importance. Mary added fourteen to the number, and Elizabeth, in a similar manner, increased the representation in parliament by no less than sixty-two members. The interference of the crown in elections was exerted in the most open manner. In 1553 Edward VI. directed a circular letter to all sheriffs, commanding them to apprise the freeholders, citizens, and burgesses of their respective counties, "that our pleasure and commandment is, that they shall choose and appoint, as nigh as they possibly may, men of knowledge and experience within their counties, cities, and boroughs"; and especially that whenever the Privy Council, or any of them, having instructions on the king's behalf, should "recommend men of learning and wisdom, in such case their directions be regarded and followed." Accordingly several persons—all of them belonging to the court, or in places of trust about the king—were recommended by letters to the sheriffs, and elected as knights for different shires (*u*). The writs for the parliament summoned by Mary in 1554, to sanction the return of the country to obedience to the apostolic see, were accompanied in like manner by royal circulars requiring the mayors, sheriffs, and other influential persons to admonish the electors to choose as their representatives "such as, being eligible by order of the

(*u*) Hallam, Const. Hist., i. 45, citing Strype, ii. 394. What appear to be first drafts of circular letters are preserved in Lansd. MS. 3, cited by Froude, v. 464, n. 1. In some instances the orders of the crown were sent direct to the candidate himself. The Council, in a letter to Sir P. Hoby, inform him "that his Majesty hath willed us to signify unto you this his pleasure to have you one of the Commons House, which thing we also require you to foresee, that either for the county where ye abide ye be chosen knight, or else otherwise to have some place in the House, like as all others of your degree be appointed. And herein, if either his Majesty or we know where to recommend you, according to your own desires, we would not fail but provide the same." Harl. MS. 523, in Froude, v. 465.

laws, were of a wise, grave, and catholic sort" (*w*); and the Earl of Sussex, one of the queen's councillors, wrote to the electors of Norfolk and to the burgesses of Yarmouth requesting them to reserve their votes for the persons whom he should name (*x*).

Law of Treason (*y*).

Treason by the common law.

The law of treason, with all its subtle distinctions and cruel constructions, is so interwoven with the thread of English constitutional history, that some notice of it is absolutely necessary. In the following brief sketch every important feature has been touched upon. The crime of high treason as it existed at common law prior to the statute of Edward III. was vague and indefinite. The fundamental principle upon which the law of treason was based, was the allegiance, either natural or local, due from every man who lives under the king's protection. Every subject, from the age of fourteen, was bound to take the oath of allegiance if called upon to do so (*z*); but allegiance was equally due whether the oath had been taken or not. The smallest breach of allegiance was punished as treason; but the ruling of the judges as to what constituted a breach was at once arbitrary and unlimited, varying in different

(*w*) Froude, vi. 260. These general directions were copied from a form which had been in use under Henry VII.

(*x*) Burnet, ii. 228.

[On this period, see Maitland, Const. Hist., pp. 237-8, who remarks *loc. cit.*: "The Tudor monarchy is indeed something very different from the Lancastrian—the latter was a very limited monarchy; the former, if we regard its practical operation, seems almost unlimited"; and W. Busch, England unter den Tudors (Stuttgart, 1892), a valuable contribution to English political history in the 16th century. The author regards the development of parliament from a new side, and asserts that parliament really never came into prominence save when the crown succeeded in getting the better of the higher nobility; and that Henry VII. knew how to curb his nobles. A material aid in this direction were the "informations" which considerably helped to fill the royal coffers. See Hist. Zeitschrift (München-Leipzig, 1894).—Ed.]

(*y*) The author's original footnote has been recast and printed in large type; this being a convenient place for the treatment of the subject, it has been thought advisable to give it greater prominence than it had before. —Ed.]

(*z*) Britton, lib. i. c. 13.

reigns according as the power of the king or of the barons happened to be in the ascendant. In the reign of Edward I., appealing to the French courts, in opposition to the king's, was adjudged high treason in the case of Nicholas Segrave. Under Edward II., the Spencers were accused of "accroaching," or exercising "royal power," by keeping the administration in their own hands, though without violence to the sovereign. A similar charge was brought against Roger Mortimer in Edward III.'s reign. Killing the king's uncle, father, brother, or even a messenger, was held to be treason, and a knight was indicted for the treason of "accroaching royal power" by assaulting one of the king's subjects on the highway, and forcibly detaining him till he paid £90. At length, after frequent complaints and petitions from the commons against the arbitrary decisions of the courts, the popular statute of 25 Edward III. st. 5, c. 2, was passed, strictly defining the limits of treason (*a*). Seven heads of treason were declared by this statute, which also provided that no other cases should be adjudged by the judges to be treason until the king and his parliament should declare whether they ought to be so judged. The treasons enumerated in the Statute of Edward are: (1) When a man doth compass or imagine the death of our lord the king, or of our lady the queen, or of their eldest son and heir; or (2) if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or (3) if a man do levy war against our lord the king in his realm; or (4) be adherent to the king's enemies in the realm (*aa*), giving them aid and comfort in the realm or elsewhere, *thereof be proveably attainted of open deed by people of their condition* [*par gents de lour condition*—the *judicium parium* of Magna Carta]. (5) And if a man counterfeit the king's great or privy seal, or his money; (6) and if a man bring false money into this realm, counterfeit to the money of England, knowing the money to be false, to merchandise or make payment, in deceit of the king and his people; (7) and if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices

Stat. 25. Edw. III. 1352.

(*a*) *Supra*, p. 256, note (*h*).

(*aa*) See *infra*, p. 383.

of assize, and all other justices assigned to hear and determine, being in their places, doing their offices.

The offence of counterfeiting the king's seals or his coins ought always to have been regarded as a branch of the *crimen falsi*, or forgery, rather than a species of the *crimen laesae majestatis*, or treason; and by the recent statutes (24 & 25 Vict. cc. 98, 99) it is now punishable as felony only. Of the other species of treason enumerated it is unnecessary here to notice more than two, the 1st and 3rd.

(1) Compassing the king's death.

(1) *Compassing or imagining the death of the king.* A king, within the meaning of the Act, must be in actual possession of the crown. Only a king *de facto* is the object of treason; a king *de jure*, who merely has a title or claim to the crown without possession, has no right to allegiance. Accordingly the Act 2 Hen. VII. c. 1, which is declaratory of the common law, declares that no person shall be convicted or attainted of treason for serving and paying allegiance to a king *de facto*. The words *compass* and *imagine* are synonymous, and denote the purpose or design of the mind or will, even though the purpose or design take not effect; but the statute especially requires that the traitorous imagination be manifested by some *overt* or open act. Still, it is the mental act which, under this head of the statute, constitutes the crime of treason; and therefore

Overt acts of compassing.

in the trial of the Regicides, in 1660, it was held that not the decapitation of Charles I. but the "compassing" his death constituted the treason, and that the killing was only an overt act proving the compassing. Meeting and consulting *how* to kill the king, although no scheme be finally adopted, is an overt act, and every person who assents to overtures for that purpose, or who encourages others, by advice, persuasion, or command, to commit the fact, shares in the guilt. Sir Everard Digby was convicted, in January, 1606, of high treason for being privy to and not revealing the Gunpowder Plot, although it was not proved that he either said or did anything at the consultation. Not merely personal plots of assassination, but all wilful and deliberate attempts which may immediately, or consequently, endanger the life of the sovereign, have been held within the scope of the statute. Thus a conspiracy to depose or imprison the king has been constructively determined to

be an overt act of compassing his death; "for experience has shewn," observes Sir Michael Foster (*b*), "that between the prisons and the graves of princes the distance is very small." Other offences still less personal, but having a remote tendency towards the same end, have been held to be overt acts under this head of treason. Entering into measures in concert with foreign powers to invade the kingdom would seem more properly to fall under the head of levying war or of adhering to the king's enemies. But unless the powers incited be actually at war it will not fall within any branch of the statute, except compassing the king's death. And even when the overt act would have properly fallen within the clause of adhering, it has been held an overt act of compassing, as in the case of Patrick Harding, who raised and sent men to France, then at open war with us, for the purpose of restoring James II.

Corresponding with foreigners to invade the kingdom.

The Duke of Norfolk was convicted in 1572, contrary to all law and justice, of a treason resting on presumptions and inferences only. The overt act was his intended marriage with Mary Queen of Scots, and his correspondence with the Duke of Alva to raise an army to invade the kingdom. It was argued that as Mary had formerly laid claim to the crown, whoever married her would support her title, and consequently endeavour to depose Queen Elizabeth. The letters to Alva had no signatures, and were only proved to be the Duke's by reading the confession of an agent, who vouched for their authenticity. A distinct act of treason, such as levying war, has been decided to be an overt act of compassing. The statute of 29 Hen. VI. c. 1, which attainted Jack Cade of rebellion, declared that gathering men together and inciting them to rise against the king was an overt act of imagining his death. Mere loose words spoken, not relating to any treasonable purpose, in agitation, are not an overt act: but words may *expound* an overt act, in itself *indifferent*, and words of advice and persuasion in contemplation or prosecution of a traitorous design, actually on foot, may be overt acts. Words *written and published*, either in letters or books, where the matter contained *imports a compassing*, have been held overt acts.

Strained constructions of the Statute.

(*b*) Crown Law, p. 196.

It was held so in *Twyn's Case* (15 Car. II.), for publishing "A Treatise of the Execution of Justice," asserting that the supreme magistrate was accountable to the people, and that they might take up arms to put the king to death: and in *Williams's Case* (17 Jac. I.), for enclosing and sending in a box to James I. a book declaring that the king would die in the year 1621, and that the kingdom would be destroyed. Under the Stuarts, even *unpublished* writings were made use of to convict their authors of treason, as in *Peacham's Case* (1615), in whose study was found a manuscript sermon which had never been preached or published; and in that of *Algernon Sidney*, at whose trial (in 1683) for participating in the Rye House Plot, the want of a second witness was supplied by the production of a discourse found in his closet, and evidently written many years before, in which it was maintained that kings were accountable to the people for their conduct.

(2) Levying war against the king.

(2) The third species of treason enumerated in the Statute of Edward III. is that of *levying war*, which lies not in the intention or purpose, but in the act itself. The levying must be *against the king*, which is either direct against his person, or constructive against his government. Enlisting and marching have been held sufficient acts without coming to a battle or action. Attacking the king's forces in opposition to his authority, upon a march or in quarters, and holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, have been held a sufficient levying of war. The true criterion as to what unlawful assemblies amount to a levying of war, is *Quo animo* did the parties assemble? and in order to constitute the offence, the object of the assembly must be to effect by force something of a *public and general concern*. For if the assembly be upon account of some *private* quarrel, or to take revenge on *particular* persons, the statute of Edward itself has specially declared that it is no treason. "If any man," says the statute, "ride armed, open or secretly, with men of arms, against any other to slay or to rob him, or to take and keep him till he make fine for his deliverance, it is not the mind of the king or his council that in such case it shall be judged treason; but it shall be judged felony or trespass according to the law of the land

of old time used, and according as the case requireth." In accordance with this principle, and within the reason and equity of the statute, while on the one hand popular risings to maintain a *private* claim or to destroy *particular* enclosures, or to break prisons in order to release *particular* persons, and risings of men of a *particular* class against others of the same class—as of the weavers in and about London, who rose to destroy all engine-looms because those machines enabled those of the trade who made use of them to undersell those who had them not—have been held *not* to amount to levying war within the statute: on the other hand, with equal reason, every insurrection which in judgment of law is intended against the person of the king, either to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors—although not conducted with military array—has been held to be a levying of war within the statute. Another class of popular risings, not levelled at the person of the king, but "against his Royal Majesty," that is, against the established law and government, have been brought within the clause of the statute against "levying war against the king," by constructions scarcely less strained than those upon compassing his death. Acting upon the logical distinction between general and particular purposes, but regardless of the fact that in the majority of cases there was an entire absence of any intention either to depose the sovereign or generally to subvert his government, the courts held trifling insurrections for the purpose of destroying *all* brothels, or of throwing down *all* enclosures or *all* dissenting meeting houses (*c*), or to enhance the price of *all* labour, or to open *all* prisons, or to expel *all* foreigners, or to redress real or imaginary *national* grievances in which the insurgents had no special interest—to be constructive "levyings" within the statute.

Conspiracies to levy war.

It is to be noted that the Statute of Edward III. entirely omitted, in its enumeration of the modes whereby treason could be committed, to include the act of conspiring or

(c) *Cf. Dammaree's Case*, [1710] 15 St. Tr. 521; *Willis's Case*, [1710] *ibid.* 613; *Purchase's Case*, [1710] *ibid.* 651. (Cases arising out of Sacheverell's trial).

consulting to levy war. But by a strained construction it gradually became the established doctrine that a conspiracy to levy war against the king's person, though not in itself a distinct treason, might be received in evidence as an overt act of compassing his death. Notwithstanding this construction, however, it was thought necessary under Elizabeth, Charles II., and George III., to pass temporary Acts rendering a conspiracy to levy war treasonable (13 Eliz. c. 1; 13 Car. II. c. 1; 36 Geo. III. c. 7). The disposition to extend a constructive interpretation to the Statute of Edward III. continued to increase down to the end of George III.'s reign, during which it was carried to a great length, especially by Chief Justice Eyre in the trials of 1794. Finally by the 57 Geo. III. c. 6, making perpetual the temporary Act, 36 Geo. III. c. 7 (the main object of which seems to have been to turn into substantive treasons certain things which had been judicially construed to be treasonable), it is enacted: (1) That if any person shall, within the realm or without, compass, imagine, invent, devise or intend death, destruction, or any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint of the person of the king, his heirs and successors; and shall express, utter, or declare such intention by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof upon the oaths of two lawful and credible witnesses—he shall be adjudged a traitor and suffer as in cases of high treason. (2) It was also declared by the same Act that it should be treason to compass, imagine or intend (such intention being expressed by print, writing or overt act) to deprive or depose the king or his successors from the style, honour, or kingly name of the imperial crown, or to levy war within the realm in order by force to compel the sovereign to change his measures or counsels, or to overcome either House of Parliament, or to stir any foreigner with force to invade this realm, or any of the king's dominions. Neither under this Act, nor, as we have seen, under any of the judicial constructions, was the *speaking* of words, not written or published, held to amount to an overt act of treason, unless the words were direct counsellings or persuasions in prosecution of a traitorous design

actually on foot. Thus the law continued down to the year 1848, when the 11 & 12 Vict. c. 12, "An Act for the better security of the Crown and Government of the United Kingdom," was passed. By this Act, commonly called the "Treason-Felony Act," the latter part of the statute 57 Geo. III. not relating to the king's person, was repealed, and the offences therein enumerated were made felonies, but with the addition of the words "open and advised speaking" to the other modes of expressing the compassing.

Treason-Felony Act, 11 & 12 Vict. c. 12.

In addition to the species of treason already enumerated, the three following have been created by statutes still in force: (1) By 1 Anne, st. 2, c. 17, s. 3, the endeavouring to deprive or hinder any person being the next in succession, according to the limitations of the Act of Settlement, from succeeding to the crown, and maliciously and directly attempting the same by any overt act. (2) By 6 Anne, c. 7, the maliciously, advisedly and directly, by writing or printing, maintaining and affirming that any other person hath any right or title to the crown of this realm, otherwise than according to the Act of Settlement, or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes, to bind the crown and the descent thereof (*d*). (3) By 3 & 4 Vict. c. 52, s. 4 (having reference to the contingency that any issue of the queen should happen to ascend the throne under the age of eighteen), it was enacted that any person aiding or abetting in bringing about a marriage to, as well as any person so marrying, such issue under the age of eighteen, without the consent in writing of the regent, and the assent of both Houses of Parliament previously obtained, should be guilty of treason.

Treasons created by 1 Anne, st. 2, c. 17; 6 Anne, c. 7; 3 & 4 Vict. c. 52.

At common law, one positive witness was sufficient in the case of treason as in every other capital case. But by the salutary Act, 5 & 6 Edw. VI., c. 11, to which reference has been made above (*dd*), it was enacted "that no person shall be indicted, arraigned, condemned, convicted, or attainted, for any treasons that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done, unless the same offender or offenders be thereof accused by two

Evidence. Statute of Edw. VI.

(*d*) *Supra*, p. 201.

(*dd*) [*Supra*, p. 366.]

lawful accusers; which said accusers, at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that they have to say against the said party, to prove him guilty of the treason or offences contained in the bill of indictment laid against the party arraigned." Yet for a century after the passing of this Act, little if any regard was paid to it in crown prosecutions, or indeed to the common well-known rules of legal evidence. It was even contended that a statute of 1 & 2 Phil. & Mary, c. 10 (which, as Sir Michael Foster has shown, was really meant to restore to the accused "the benefit of a trial by jury of the proper county, with all the advantages of defence peculiar to that method of trial, where former statutes had deprived him of it"), had repealed the statute of Edward VI. by enacting that "all trials for any treason shall be according to the due order and course of the common law and not otherwise." At the trial of the Regicides, however, in 1660, and upon Lord Stafford's trial, in 1680, it was treated as a point beyond all doubt that the law required two witnesses; and from the date of the Restoration the wholesale distinction (subsequently established by the statute of William III.) appears to have been taken, that although the two witnesses may depose to different overt acts, the acts must relate to the same species of treason; so that one witness to an alleged act of compassing the king's death cannot be conjoined with another deposing to an act of levying war, in order to make up the required number. In 1691, a bill for the regulation of trials upon charges of high treason passed the commons; but in consequence of the opposition of the court, and a dispute between the two Houses, it fell to the ground. Though more than once revived, the obstinacy of the commons in resisting a very just and reasonable amendment of the lords as to the trial of peers in the court of the High Steward, delayed the passing of the measure until 1695, when it became law as the Act 7 Will. III. c. 3. It provides that prisoners indicted for high treason shall have a copy of the indictment delivered to them five days at least before the trial, and a copy of the panel of the jurors two days before the trial; that

Statute of Will. III. 1695.

they shall be allowed the assistance of counsel throughout the trial, and be entitled to process of the court to compel the attendance of their witnesses, who must be examined on oath. It removes any doubts as to the statute of Edward VI. by requiring the oaths of two lawful witnesses either both to the same overt act, or one of them to one, and the other to another overt act of the same treason: unless the prisoner shall willingly, without violence, in open court, confess the charge. It limits prosecutions for treason to the term of three years from the commission of the offence, except in the case of attempted assassination of the king. The contested provision as to the trial of peers (intended to remedy a serious defect in the constitution of the court of the High Steward, in which the peers-triers were a select number returned at the nomination of the High Steward) was included in the Act, which provided that all peers having a right to sit and vote in parliament shall be summoned on the trial of any peer for treason, and that every peer so summoned and appearing shall vote in the trial. By a later statute, 7 Anne, c. 21, the time for delivering a copy of the indictment to the prisoner was extended to ten days, and it was directed that a list of the witnesses intended to be brought for proving the indictment, and of the jury, with their professions and places of abode, should be delivered to the prisoner at the same time with the copy of the indictment. But the operation of this clause was suspended until after the death of the Pretender.

Statute of Anne, 1708.

In recent times the tendency of the legislature has been to restrict rather than to enlarge the crime of treason. Since the passing of the Riot Act, 1 Geo. I., st. 2, c. 5, the Government has possessed a great accession of strength in dealing with all tumultuous risings attended with violence, and can more advantageously treat the offence as felony under that Act than as treason. A large number of offences formerly punishable as treason have been removed into the class of "treason-felony" by the Act 11 & 12 Vict. c. 12, to which reference has already been made. By another Act, 5 & 6 Vict. c. 51, the offence of

The Riot Act, 1 Geo. I.

5 & 6 Vict. c. 51.

any person discharging, pointing, aiming, or presenting, at the person of the queen, any gun or other arms (whether containing explosive materials or not); or striking at or attempting to throw anything upon her person; or producing any firearms or other arms, or any explosive or dangerous matter near her Majesty's person—with intent to injure or alarm her, is declared to be a high misdemeanour and punishable by penal servitude for seven, and not less than three, years; or by imprisonment for not more than three years, and (if the court shall so direct) by a whipping not more than thrice during that period. A conviction under this statute may be supported by the like evidence as if the prisoner stood charged with murder, so that the rule requiring two witnesses is in this case dispensed with. By the 33 & 34 Vict. c. 23, forfeiture and attainder for treason or felony have been abolished (*e*).

British Colonies.

As regards the British Colonies, the law in the main agrees with that of the mother country: but it is quite competent for a colony to deal with treason by its own legislation, which need not necessarily be in agreement with English law. The Indian penal code makes it punishable with transportation for life to wage war against the government of any Asiatic power in alliance or at peace with the queen, or to attempt to excite feelings of disaffection to the government.

A striking feature of colonial legislation on this subject is the great number of Acts of indemnity passed after different rebellions. Instances of such Acts occur in the legislation of Canada, New Zealand, St. Vincent, and Jamaica. The most important in the history of law is the Jamaica Act (1866), which indemnified Governor Eyre for any acts done during the suppression of the rising in 1865. It was held by the Exchequer Chamber, in 1870, that this Act protected Mr. Eyre from being successfully sued in

(*e*) On the above subject see Foster, Crown Law; Hale, Pleas of the Crown; Kelyng, Crown Cases (1708); Hawkins, Pleas of the Crown.

England, on a cause of action arising out of his acts during the outbreak (*f*).

(*f*) *Phillips* v. *Eyre*, [1870] 6 Q.B. 1. See Encycl. Brit. (11th ed., vol. 27), sub "Treason" and references cited; also Hallam, Const. Hist., iii. p. 203; Stubbs, Const. Hist., iii. p. 535; Stephen, Hist. Crim. Law, ii. c. 23; Willis-Bund, Selection of Cases from State Trials.

Recent cases

[In a case arising out of the South African War, 1899-1901, *Rex* v. *Lynch* ([1903] 1 K.B. 444), the defendant was tried at bar for treason in adhering to and aiding the enemies of the queen in South Africa. This case established (*a*) that the Naturalization Act (33 & 34 Vict. cap. 14) does not permit naturalization (see *infra*, chap. xvi., *in init.*) in a foreign state at war with Great Britain; that a British subject who renounces his allegiance and attempts to procure himself to be naturalized in an enemy's country in time of war is guilty of high treason; and (*b*) that the Statute of Treasons (25 Edw. III., stat. 5, cap. 2) applies to acts committed either *within* or *without* Great Britain; thus disposing of the contention that the words of the Act "adhering to the king's enemies in his realm" meant only that the accused *must be at the time in the realm*. In the case of Savarkar, a Hindu, in 1909, the offence was committed in India and sentence passed, in accordance with the provisions of the Indian Penal Code. The great notoriety the case attained was due to a point of international law, the prisoner having escaped at Marseilles and taken refuge on French territory. The Hague Tribunal for the adjustment of international differences rejected the claim of the French Government to asylum and extradited the prisoner to the British authorities. (For a note on asylum *vide infra*, chap. xvi., *in init.*) In *R.* v. *Ahlers*, [1915] 1 K.B. 616, C.C.A., it was held that not only the bare acts, but also the purposes and intention of the accused must be taken into consideration. In *R.* v. *Casement*, [1917] 1 K.B. 98, it was held that a British subject gives aid and comfort to the King's enemies, and is therefore guilty of treason, if he does an act which strengthens, or tends to strengthen, the enemies of the King in the event of a war against the King, or which weakens or tends to weaken, the power of the King and of the country to resist, or to attack, the enemies of the King and of the country.

The raid made in 1896 by Dr. Jameson and his freebooters into the Transvaal Republic might presumably have been treated as being a treasonable act committed against her British Majesty as suzerain of the Transvaal Republic. The prisoners were, however, tried under the Foreign Enlistment Act of 1870, sec. 11, which provides that, "if any person within the limits of her Majesty's dominions, and without the licence of her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, he shall be liable to imprisonment not exceeding two years." In 1887 an offence was held to have been committed under this Act, when General Sandoval, Sir W. Call, and others were indicted for embarking on a naval expedition against the state of Venezuela.—Ed.]

CHAPTER XI.

THE REFORMATION IN ENGLAND.

Essential characteristic.

The separation of the Church of England from that of Rome, formally accomplished under Henry VIII., was a political and legal rather than a religious reformation. The doctrinal changes which followed under Edward VI. and Elizabeth were an unintentional consequence, to which Henry and his parliament more than once declared themselves utterly repugnant. But in reality the reformation, in both its political and religious aspects, was the effect of causes which had been in operation for centuries, not only in England, but throughout Europe. "No revolution," says Hallam, "has ever been more gradually prepared than that which separated almost one half of Europe from the communion of the Roman see; nor were Luther and Zwingli any more than occasional instruments of that change which, had they never existed, would at no great distance of time have been effected under the names of some other reformers. At the beginning of the sixteenth century, the learned doubtfully and with caution, the ignorant with zeal and eagerness, were tending to depart from the faith and rites which authority prescribed" (*a*).

(*a*) Hallam, Const. Hist., i. 57.

["The reformation, like every other great movement transplanted from the continent into England, assumed, in the island world, a form at once local and peculiar. The causes which led the English Church to take her stand midway between Rome and Geneva; the causes which led the sects dissatisfied with her conservatism to dissent from her creed and episcopal government, in order to establish other creeds and forms of organisation more liberal and republican, were in the main directed and controlled by the special circumstances incident to the local and personal history of the Church of England. . . . The forces of the English reformation, viewed in their broader aspects, passed through four distinct stages before they reached their ultimate conclusion. The first stage represents the severance, which took place during the reign of Henry VIII., of the

National character of the English Church.

In England, the church, from its first institution, had always possessed a marked national character. The spiritual primacy of the pope and his authority in matters of faith were reverently admitted, but the relation was rather that of mother and daughter than of master and servant (*b*); while the exorbitant claims of jurisdiction and territorial power asserted by Hildebrand and his successors, together with the pecuniary exactions founded on those claims, were persistently, though with varying degrees of firmness, resisted by the English kings and people.

Church and State before the Conquest.

Prior to the Norman conquest, church and state in England were so intimately united that they were practically identical. William of Normandy, to further his designs on England, entered into an alliance with the papacy: and when the conquest—which it had been his object to present to the eyes of Europe somewhat in the light of a crusade—had been effected, the ecclesiastical power was to a great extent separated from the civil power and placed in much closer communion with and subordination to the papal see. But anxious as he was to propitiate the see of Rome, William was careful not to surrender the ancient supremacy of the state over the national church (*c*). Still, the impetus given by the conquest to the papal power in England caused it to go on rising, until notwithstanding the partial checks which it received under Henry I. and Henry II., on the questions of investitures and clerical immunity from civil jurisdiction—it reached its acme under John and Henry III. For one hundred and fifty years succeeding the conquest

Growth of papal power from the conquest till the reign of Henry III.

English Church from the See of Rome. The second represents the doctrinal changes which took place during Edward VI. The third stage represents the dissent of the puritan and calvinistic elements from the established Church. The fourth stage represents the organisation into religious associations of a more extreme class, called independents." -Taylor, English Const., p. 597. Gneist, Hist. Engl. Const., p. 482, remarks: "The time at last drew nigh for resuming the work of ecclesiastical reform, which had been interrupted in the 15th century." See also Cobbett's Protestant Reformation, ed. by F. A. Gasquet (1897), and, especially, Maitland, Const. Hist., pp. 511 *seq.*—Ed.]

(*b*) For the *maternal* status of the church of Rome, see St. Bern., De Consid., l. iv. c. vii. Greg. VII., Lib. v. Ep. 20.

(*c*) *Supra*, pp. 66, 67.

the right of nominating the archbishops, bishops, and mitred abbots had been claimed and exercised by the king. This right had been specially confirmed by the Constitutions of Clarendon, which also provided that the revenues of vacant sees should belong to the crown. But John admitted all the papal claims, surrendering even his kingdom to the pope, and receiving it back as a fief of the holy see. By the Great Charter the church recovered its liberties, the right of free election being specially conceded to the cathedral chapters and the religious houses. Every election was, however, subject to the approval of the pope, who also claimed a right of veto on institutions to the smaller church benefices—the small monasteries and parish churches which were in the hands of private patrons, lay or ecclesiastical. "There was thus in the pope's hand," remarks an eminent historian (*d*), "an authority of an indefinite kind, which it was presumed that his sacred office would forbid him to abuse, but which, however, if he so unfortunately pleased, he might abuse at his discretion. He had absolute power over every nomination to an English benefice; he might refuse his consent till such adequate reasons, material or spiritual, as he considered sufficient to induce him to acquiesce, had been submitted to his consideration. In the case of nominations to the religious houses, the superiors of the various orders residing abroad had equal facilities for obstructiveness." Under Henry III. the power thus vested in the pope and foreign superiors of the monastic orders was greatly abused, and soon degenerated into a mere channel for draining money into the Roman exchequer.

Edward I. resists the papal claims and exactions.

Edward I. firmly withstood the exactions of the pope, and re-asserted the independence of both church and crown. To the letter of Boniface VIII. claiming to be feudal lord of Scotland, and commanding Edward I. to withdraw his troops from that kingdom and submit his pretensions to the decision of the papal see, the parliament of England returned a very emphatic repudiation of the pope's temporal jurisdiction. "The kings of England," they said, "have never pleaded, or been bound to plead, respect-

(*d*) Froude, Hist. Eng., ii. 3.

ing their rights in the kingdom of Scotland, or any other their temporal rights, before any judge, ecclesiastical or secular. It is, therefore, and by the grace of God shall always be, our common and unanimous resolve that with respect to the rights of his kingdom of Scotland, or other his temporal rights, our aforesaid lord the king shall not plead before you, nor submit in any manner to your judgment, nor suffer his right to be brought in question by any inquiry, nor send agents or procurators for that purpose to your court. . . . Neither do we, nor will we, permit, as we neither can nor ought, our aforesaid lord the king to do, or attempt to do, even if he wished it, any of the things aforesaid" (*e*).

Statutes to check the aggressions of the pope.

In the reign of the great Edward began a series of statutes passed to check the aggressions of the pope, and restore the independence of the national church and kingdom. The first of the series was passed in 1306-7. It recites that "the abbots, priors, and governors of religious houses, *and certain aliens their superiors*, as the abbots and priors of the Cistercians, the Premonstrants, the orders of Saint Augustine and of Saint Benedict, and many more of other religions and orders, have at their own pleasure set divers heavy, unwonted, and unportable talliages, payments and impositions upon every of the said monasteries and houses subject unto them in England, Ireland, Scotland and Wales, without the privity of the king and his nobility, contrary to the laws and customs of the said realm"; and that in consequence of such impositions, "the service of God is diminished; alms are not given to the poor, the sick, and the feeble; the health of the living and the souls of the dead be miserably defrauded; hospitality, almsgiving and other godly deeds do cease; and so that which in times past was charitably given to godly uses and to the service of God, is now converted to an evil end, by permission whereof there groweth great scandal to the people." It was therefore enacted—"the king considering it would be very prejudicial to him and his people, if he should any longer suffer so great losses and injuries to be winked at"—that for the future no

(*e*) Rymer, ii. 873-875.

abbot or other religious person should, directly or indirectly, secretly or openly, carry or send any tax, rent or talliage, imposed by the superiors, or assessed amongst themselves, out of the kingdom; and that "priors aliens" should not presume to assess any such payment whatever upon religious houses subject to them (*f*).

This statute was confirmed under Edward III. in the 4th, and again in the 5th year of his reign; and in the 25th of his reign, roused "by the grievous complaints of all the commons of his realm," the king and parliament passed the famous Statute of Provisors, aimed directly at the pope, and emphatically forbidding his nominations to English benefices. The preamble recites that "the holy church of England was founded in the estate of prelacy within the realm of England," by the king's progenitors and the ancestors of "the earls, barons, and other nobles of his realm, to inform them and the people of the law of God, and to make hospitalities, alms, and other works of charity, in the places where the churches were founded, for the souls of the founders, their heirs, and all Christians; and certain possessions as well in fees, lands, rents, as in advowsons, which do extend to a great value, were assigned by the said founders to the prelates and other people of the Holy Church of the said realm to sustain the same charge . . . the same kings, earls, barons, and other nobles, as lords and advowees, have had, and ought to have, the custody of such voidances, and the presentments of the collations of the benefices being of such prelacies: And the said kings in times past were wont to have the greatest part of their council, for the safeguard of the realm when they had need, of such prelates and clerks so advanced; but the pope of Rome accroching to him the seignories of such possessions and benefices, doth give and grant the same benefices to aliens, which did never dwell in England, and to cardinals which might not dwell here, and to others as well aliens as denizens, as if he had been patron or advowee of the said dignities and benefices, as he was not of right by the law of England. . . . And . . . now of late, our holy father the pope . . . taketh of all

Statute of Provisors, 25 Edw. III. 1351.

(*f*) 35 Edw. I. st. i. c. 1-4.

such benefices the first fruits, and many other profits, and a great part of the treasure of the said realm is carried away and dispended out of the realm by the purchasers of such [benefices and] graces aforesaid: and also by such privy reservations, many clerks advanced in this realm by their true patrons which have peaceably holden their advancements by long time, be suddenly put out." It was therefore declared that the elections of bishops and other dignitaries should be free as in time past: that the rights of all patrons should be preserved: and penalties of imprisonment, forfeiture, or outlawry, according to the degree of the offence, were enacted against all "provisors," who should obtain benefices from Rome by purchase or otherwise (*g*).

Statute forbidding citations to the court of Rome, 27 Edw. III. st. 1. 1353.

Three years afterwards it was found necessary to pass a statute, forbidding citations to the court of Rome. It was based upon "the grievous and clamorous complaints of the great men and commons, how that divers of the people be and have been drawn out of the realm to answer of things whereof the cognisance pertaineth to the king's court; and also that the judgments given in the same court be impeached in the court of another in prejudice and disherison of our lord the king, and of his crown, and of all the people of his said realm, and to the undoing and destruction of the common law of the same realm at all times used." The cumulative penalties of outlawry, forfeiture of lands and goods, and imprisonment at the king's pleasure, were therefore enacted against all people of the king's legiance who should "draw any out of the realm in plea, whereof the cognisance pertaineth to the king's court, or of things whereof judgment be given in the king's court, or who do sue in the court of another, to defeat or impeach the judgments given in the king's court," and who should fail to appear, within two months after summons before the king and his council, or in his chancery, or before the

(*g*) 25 Edw. III. st. 4. [Rev. Stat., i. 177.] ["We must remember that . . . the question lay in the background, whether the king and nation should accept, at the pope's dictation, the nomination of so large a portion of the House of Lords as the bishops really formed," which "would have placed the decision of national policy in foreign hands."—Gneist, Const. Hist., p. 401, note.—Ed.]

king's justices, to answer in their proper persons for the contempt so committed (*h*). From this statute originated the offence afterwards known as *Praemunire*, from the words of the writ *praemunire facias*, requiring the sheriff to warn the accused to appear and answer the contempt on a day fixed.

These statutes defied or evaded.

Statutes, however, were of little avail. The law still continued to be defied, or evaded, although several fresh Acts of Parliament to the same effect as the former were promulgated from time to time (*i*)

Former prohibitions re-enacted with special provisions against excommunications, 13 Ric. II. st. 2, c. 3. 1389.

In 1389, there was an expectation that the pope was about to attempt to enforce his claims, by excommunicating those who rejected them. The parliament at once passed a highly penal statute, which, besides re-enacting in the most emphatic terms the former prohibitions of papal aggressions, declared that "if any man bring or send within the realm or the king's power any summons, sentences, or excommunications against any person of what condition that he be," because of his assent to or execution of the statute of Provisors, he should incur pain of *life* and member, with forfeiture of lands and goods; and if any prelate should execute such sentences of excommunications, his temporalities should be taken from him, and abide in the king's hands till redress and correction be made (*k*).

Boniface IX. brings matters to a crisis. 1391.

Matters were shortly afterwards brought to a crisis by Boniface IX., who, after declaring the statutes enacted by the English parliament null and void, granted to an Italian cardinal a prebendal stall at Wells, to which the king had already presented. Cross suits were at once instituted by the two claimants in the papal and English courts. A decision was given by the latter in favour of the king's nominee, and the bishops, having agreed to support the crown, were forthwith excommunicated by the pope.

Attitude of parliament.

The commons were now roused to the highest pitch of indignation. They drew up, in the form of a petition to the king, a declaration of the circumstances which had occurred, and affirmed that "the said things so attempted

(*h*) 27 Edw. III. st. 1. [Rev. Stat. i. 193.]
(*i*) 38 Edw. III. st. 2; 3 Ric. II. c. 3; 7 Ric. II. c. 12; 12 Ric. II. c. 15.
(*k*) 13 Ric. II. st. 2.

be clearly against the king's crown and his regalty, used and approved of the time of all his progenitors, wherefore they and all the liege commons of the said realm will stand with our said lord the king, and his crown, and his regalty, in the cases aforesaid, and in all other cases attempted, in all points to live and to die." After this emphatic assertion of their own opinion, they prayed the king, "and required him by way of justice," to examine severally all the lords spiritual and temporal in the parliament how they thought and how they would stand. The lay lords answered directly, and the spiritual lords indirectly, to the same effect as the commons (*l*). Whereupon the petition and the separate declarations of the three estates of parliament were incorporated in the great statute of Praemunire. It was enacted, that "if any man purchase or pursue . . . in the court of Rome, or elsewhere, such translations, processes, and sentences of excommunications, bulls, instruments, or any other things whatsoever, which touch the king, against him, his crown, and his regalty, or his realm, as . . . aforesaid, and they which bring them within the realm, or them receive, or make thereof notification or other execution whatsoever within the realm or without, that they, their notaries, procurators, maintainers, abettors, fautors, and counsellors, should be put out of the king's protection, and their lands and tenements, goods and chattels, forfeit to our lord the king; and that they be attached by their bodies, if they might be found, and brought before the king and his council, there to answer to the cases aforesaid, or that process be made against them by *praemunire facias* in manner as it is ordained in other statutes of provisors against those which do sue in the court of another in derogation of the regalty of our lord the king" (*m*).

Statute of Praemunire, 16 Ric. II. c. 5. 1392.

The firm and resolute attitude assumed by the country caused Boniface to yield; "and for the moment," observes Froude, "and indeed for ever under this especial form, the wave of papal encroachment was rolled back. The temper which had been roused in the contest might perhaps have carried the nation farther. The liberties of the crown

(*l*) Rot. Parl., iii. 304.
(*m*) 16 Ric. II. c. 5; Stat. of the Realm, ii. 85; Rev. St., i. 263.

had been asserted successfully. The analogous liberties of the church might have followed, and other channels, too, might have been cut off through which the papal exchequer fed itself on English blood. But at this crisis, the anti-Roman policy was arrested in its course by another movement, which turned the current of suspicion, and frightened back the nation to conservatism. While the crown and the parliament had been engaged with the pope, the undulations of the dispute had penetrated down among the body of the people, and an agitation had been commenced of an analogous kind against the spiritual authorities at home. . . . This form of discontent found its exponent in John Wycliffe, the great forerunner of the reformation, whose austere figure stands out above the crowd of figures in English history, with an outline not unlike that of another forerunner of a greater change. . . . The burden of Wycliffe's teaching was the exposure of the indolent fictions which passed under the name of religion in the established theory of the church. He was a man of most simple life; austere in appearance, with bare feet and russet mantle. . . . By the contagion of example he gathered about him other men who thought as he did: and gradually, under his captaincy, these 'poor priests,' as they were called . . . spread out over the country as an army of missionaries to preach the faith which they found in the Bible -to preach not of relics and of indulgences, but of repentance and of the grace of God. They carried with them copies of the Bible, which Wycliffe had translated, leaving here and there, as they travelled, their costly treasures, as shining seed-points of light, and they refused to recognise the authority of the bishops, or their right to silence them. If this had been all, and perhaps, if Edward III. had been succeeded by a prince less miserably incapable than his grandson Richard, Wycliffe might have made good his ground; the movement of the parliament against the pope might have united in a common stream with the spiritual move against the church at home, and the reformation have been antedated by a century" (*n*).

Rise of the Lollards.

John Wycliffe, 1360.

The Bible translated.

(*n*) Froude, Hist. Eng., ii. 12-15.

But the "poor priests" had other doctrines besides those which they found in the Bible. The tenets of Wycliffe himself were not free from revolutionary tendencies, though probably intended by him, so far as regarded temporal matters, as mere idealistic theories; his followers superadded, and propagated among their ignorant proselytes, wild socialistic views which did much harm, not only to their cause but to the reputation of their master. Although there is no evidence that Wycliffe himself had any hand in exciting the insurrection of the villeins in 1381, the complicity of many of his followers, the Lollards, is undoubted. John Balle, the fanatical leader of the insurgents, is said to have confessed before his execution that he had been for two years a pupil of Wycliffe, and had imbibed his views on the Eucharist (*o*). The insurrection was in fact a great blow to Wycliffe and the Lollards. Now that it was seen that they had become political revolutionists as well as religious reformers, a reaction set in. In the parliament which met in May, 1382, Archbishop Courtenay procured a statute to be irregularly passed, without the assent of the commons, ordering that commissions should issue out of the chancery directing the sheriffs to arrest all persons certified by the bishops to be preachers of heresy, and their abettors, and to keep them in prison "until they will justify themselves according to reason and the law of Holy Church" (*p*). Prosecutions followed; but Wycliffe petitioned against the measure, and in the succeeding parliament the commons demanded and obtained its repeal, on the ground that their assent had never been given (*q*).

Revolutionary and socialistic tendencies of Wycliffe's followers.

Conservative reaction in consequence.

(*o*) Fasciculi Zizaniorum Magistri Johannis Wyclif, edited by Canon Shirley (Rolls Series), p. 273.

(*p*) 5 Ric. II., st. 2, c. 5, Stat. of the Realm, ii. 26.

(*q*) In this statute, or rather ordinance, the assent of lords and commons is not expressed ("it is ordained and assented in the present Parliament"). In the next parliament, which met in October of the same year, 1382, the commons, reciting this statute, declare it was never assented to or granted by them, but that what had been proposed in this matter was without their assent, and pray that the statute may be annulled; for it was never their intent, they said, to be judged by, or to bind themselves or their descendants to, the bishops more than their ancestors had been bound in times past. The king returned an answer agreeing to their petition (Rot. Parl., 5 Ric. II. iii. 141; Hallam, Midd. Ages, iii. 89). Nevertheless the pretended statute

Henry IV. supports the prelates.

During the remainder of Richard's reign, after the panic of the insurrection had subsided, the Lollards, though no longer favoured by the court and nobility, were very little molested. It was the policy of Henry IV. to gain the support of the prelates by sustaining them against their new adversaries, who, moreover, as disturbers of order, were equally obnoxious to the secular power (*r*). With this object was passed, in the second year of his reign, at the instigation of Archbishop Arundel, the celebrated statute De Haeretico Comburendo. The preamble recites that "divers false and perverse people, of a certain new sect, of the faith, of the sacraments of the church, and the authority of the same, damnably thinking, and against the law of God and of the church usurping the office of preaching, do perversely and maliciously in divers places within the said realm, under colour of pretended holiness, preach and teach in these days, openly and privily, divers new doctrines, and wicked, heretical and erroneous opinions, contrary to the same faith and blessed determinations of holy church. And of such sect and wicked doctrine and opinions they make unlawful conventicles and confederacies; they hold and exercise schools; they make and write books; they do wickedly instruct and inform people; and, as much as they may, incite and stir them to sedition and insurrection . . . the diocesans and their jurisdictions spiritual, and the keys of the church with the censures of the same, they do utterly contemn and despise; and so their wicked preachings and doctrines continue from day to day, to the hatred of right and reason, and utter destruction of order and good rule." To remedy these evils it was enacted, that the bishops, at their mere will and pleasure, should have power to arrest and imprison persons defamed or vehemently suspected of such offences, until they should make canonical purgation; and, if convicted, to punish them with fine and imprisonment.

Statute De Haeretico Comburendo, 2 Henry IV. c. 15. 1401.

remained on the statute book, and was not formally repealed until the passing of the Stat. Law and Revision Act, 1863.

(*r*) At the same time that Henry IV. was supporting the national church against domestic adversaries, he was careful to maintain the policy of resistance to the aggressions of the pope. See statutes 2 Hen. IV. c. 3; 2 Hen. IV. c. 4; 5 Hen. IV. c. 11; and 9 Hen. IV. c. 9.

And if any person so convicted should refuse to abjure such preachings, doctrines, opinions, schools, and misinformations, or, after abjuration, should be proved to have relapsed, then the sheriff of the county, or the mayor and bailiffs of the nearest borough, should, on requisition, be present at the pronunciation of the sentence, should receive the persons so condemned into custody, "and them before the people, in an high place, do to be burnt, that such punishment may strike in fear to the minds of others" (*s*).

Hostility of the commons.

There seems little doubt that the commons were not assenting parties to this burning statute. Throughout the whole of Henry IV.'s reign, they manifested a very hostile spirit to the clergy; and on two occasions, in 1404 and again in 1410, they proposed that the temporalities of the church should be confiscated to the use of the state; but the king refused to countenance the scheme (*t*).

Insurrection of the Lollards under Sir John Oldcastle, 1412.

The abortive insurrection of the Lollards at the commencement of Henry V.'s reign, under the leadership of Sir John Oldcastle, had the effect of adding to the penal laws already in existence against the sect. In a proclamation, the king asserted that the insurgents intended "to destroy him, his brothers, and several of the spiritual and temporal lords, to confiscate the possessions of the church, to secularise the religious orders, to divide the realm into confederate districts, and to appoint Sir John Oldcastle president of the commonwealth." In 1414 a statute was passed which, after reciting that "great rumours, congregations and insurrections of people here in the realm of England, by divers of the king's liege people, as well by them which were of the sect of heresy commonly called Lollardry, as by other of their confederacy, excitation, and abetment, now of late were made to subvert the Christian faith, and the law of God, and holy church, to destroy the king and all the estates of the realm, and

(*s*) 2 Hen. IV. cap. 15 (1401); Stat. of the Realm, ii. 125. The writ De Haeretico Comburendo, "all processes and proceedings thereupon, and all punishment by death in pursuance of any ecclesiastical censures," finally abolished by statute, 29 & 30 Car. II. c. 9.

(*t*) Walsingham, 379. From the superfluous revenues of the church, the commons asserted that the king might maintain 15 earls, 1,500 knights, and 6,200 esquires; and also support 100 hospitals for the relief of the poor.

also all manner of policy, and finally the laws of the land," enacted that the lord chancellor, the judges, and all magistrates should be sworn to use their best power and diligence to detect and arrest persons suspected of Lollardry, and deliver them over to the ecclesiastical courts, and that the prisoners on conviction should forfeit lands, goods and chattels, as in cases of felony (*u*).

Lollardry repressed but not extinguished.

Although repressed and discredited, Lollardry was by no means extinguished. Henry VI., in 1431, writes of the Lollards: "As God knoweth, never would they be subject to His laws nor to man's, but would be loose and free to rob, reve and despoil, slay and destroy all men of thrift and worship, as they proposed to have done in our father's days; and of lads and lurdains would make lords" (*w*). The revolutionary tendencies of the Lollards were indeed effectually crushed out; but "the fire of heresy continued to smoulder," and copies of Wycliffe's Bible were still read in secret with fear and trembling. During the troubled period of the Wars of the Roses we hear little of heretical doctrines, but from the beginning of the sixteenth century

It revives at beginning of 16th century.

the records of the bishops' courts are filled with accounts of prosecutions for heresy. In the first years of Henry VIII. several persons were burnt for this crime, while others only escaped by abjuring their errors. About the

The "Association of Christian Brothers."

same time the mantle of Wycliffe's "poor priests" was taken up by a society in London calling itself "The Association of Christian Brothers." "It was composed," says Froude, "of poor men, chiefly tradesmen, artisans, a few, a very few of the clergy; but it was carefully organised, it was provided with moderate funds, which were regularly audited; and its paid agents went up and down the county carrying testaments and tracts with them, and enrolling in the order all persons who dared to risk their lives in such a cause" (*x*). Even those persons who felt no sympathy with the doctrines of Lollardry had been long disgusted with the vices and exactions of the papal see, with the inordinate wealth, privileges, and en-

(*u*) 2 Hen. V. c. 7 (1415).
(*w*) Archaeologia, vol. xxiii. pp. 339 *seq.*
(*x*) Froude, Hist. Eng., ii. p. 26.

croaching temper of the clergy, and the abuses of the ecclesiastical courts.

Benefit of clergy.

One of the most mischievous of clerical privileges was the immunity of all tonsured persons from civil punishment for crimes. This had been partially restrained under Henry VI., by requiring that clerks arrested on any criminal charge, instead of being instantly claimed by the bishop, should plead their privilege at the time of arraignment, or after conviction. Under Henry VII. all clerks convicted of felony were ordered to be burned in the hand; and in 1513, the "benefit of clergy" was entirely taken away from murderers and felons (*y*). The immunity was, however, still enjoyed by priests, deacons, and sub-deacons. In 1515, Dr. Standish, having denied the right of clerks to be exempt from the jurisdiction of the king's courts, was attacked by convocation; whereupon parliament petitioned the king to support him against his enemies. The king, after hearing both sides, decided in favour of Standish.

About the same time popular indignation was greatly excited against the clergy by the case of Richard Hunne, a citizen of London, who having sued a clerk, in a civil court, for illegal extortion, was, by way of retaliation, prosecuted in the bishops' court for heresy, and having been committed to the bishop's prison, was found hanged in his chamber. The bishop's chancellor and sumner were indicted for the murder on such vehement presumption, that, a conviction being almost certain, the bishops appealed to the king to defer the trial, declaring that the London juries were so prejudiced against the church that they would find Abel guilty of the murder of Cain; and that the clergy ought to have time to inquire of the court of Rome whether submission to civil courts was consistent with the laws of God and the liberties of holy church. In reply Henry declared that "By the permission and ordinance of God, we are king of England; and the kings of England in times past never had any superior but God only. Therefore, know you well, that we will maintain the right of our crown, and of our temporal jurisdiction,

(*y*) 4 Hen. VIII., sess. 2, c. 2.

as well in this as in all other points, in as ample a manner as any of our predecessors have done before our time" (*z*).

Luther at Wittenberg, 1517.

Such was the state of popular feeling in England when Martin Luther nailed his theses to the church door of Wittenberg, and set in motion that mighty religious revolution which, while it has to some extent affected the destinies of all western nations, has in an especial manner influenced the religious and political development of the English people (*a*).

Attitude of Henry VIII.

Inclined as a man of Henry's intelligence and force of character must have been to reform the abuses of the ecclesiastical system and curb the excesses of clerical power, he was altogether opposed to doctrinal innovations. In defence of orthodoxy he even condescended to a polemic contest with Luther, and for the treatise, *Assertio Septem Sacramentorum adversus Martinum Lutherum*, received from Pope Leo X. the title of "Defender of the Faith." But among the people the writings of the "arch-heretic," and of other foreign reformers, were sedulously circulated by the "Christian Brothers," until at length, under Edward VI. and Elizabeth, English Lollardism, stimulated and developed by the influence of Germanic protestantism, brought about the doctrinal, as Henry VIII. had brought about the political and legal, reformation of the national church. Some reform of the ecclesiastical system, and even of the doctrines of the church, must certainly have been carried out at no great distance of time even had no quarrel arisen between Henry VIII. and the papacy. The crisis was precipitated by the famous divorce suit against Queen Catherine. It is unnecessary here to discuss the merits of the case, or to dwell upon the vacillation and duplicity of Pope Clement VII., "the assurances he gave the king, and the arts with which he receded from them, the unfinished trial in England before his delegates, Campeggio and Wolsey, the opinions obtained from foreign universities in the king's favour, not always without a little bribery, and those of the same import at home, not given without a little intimidation, or the tedious

(*z*) Burnet, Hist. Reformation, i. part 1.
(*a*) See Macaulay, Hist. Eng., i. [49].

continuance of the process after its adjournment to Rome" (*b*).

The divorce suit.

More than five years elapsed between Henry's first application to the pope, in 1527, for a bull annulling his marriage with Catherine as being originally contrary to the laws of God, and the celebration of his marriage with Anne Boleyn in November or January, 1532-3. On April 12, 1533, the marriage was publicly owned; on May 23, Archbishop Cranmer pronounced sentence of divorce from Catherine; and on September 7 following Anne became the mother of Elizabeth. On March 23, 1534, the pope, urged by the cardinals to extreme measures, pronounced a definite sentence in favour of Catherine, and required the king under pain of excommunication to take her back as his wife. Henceforth, the breach between the king and the pope was irreparable; but long before the final rupture Henry had entered upon the course of ecclesiastical reform, which was retarded or accelerated as the progress of the great suit seemed to call for a conciliatory or threatening attitude on the part of the king.

The "Reformation Parliament," 1529-36.

It is remarkable that the seven years' legislation which abolished the papal supremacy in England, reformed the constitution and administrative system of the Anglican Church, and established the royal supremacy, was the work of one and the same parliament. The "Reformation Parliament" met in London on November 3, 1529, after an illegal intermission of the National Council for seven years, and, with the exception of a single session, for fourteen years. It was continued by prorogations—unusual in those days—from year to year, until it was finally dissolved on April 14, 1536, having completed the task for which it had been specially summoned (*c*).

(*b*) Hallam, Const. Hist., i. 61.

(*c*) ["The so-called Reformation Parliament . . . was, with many prorogations, in constant activity . . . from Nov. 1529 to April 1536. With great skill the initiative was taken by an address of the Commons, in which complaint was made of the increase of heretical teaching ('frantic and seditious books contrary to the true Catholic faith') and . . . the strongly prominent accusation 'that such ecclesiastical laws and measures attack your Majesty's prerogative and do your faithful subjects grievous wrong.'" Gneist, Hist. of Engl. Const., p. 489, note.—ED.]

We shall consider the ecclesiastical reforms of the Reformation Parliament in the chronological order of its seven sessions.

Session I. 1529.

Petition of the commons for a scrutiny into ecclesiastical abuses.

Soon after the meeting of parliament a petition was presented to the king, in the name of the commons of England, containing what was in fact a formal "acte d'accusation," with a detailed summary of grievances, against the clergy generally and the bishops in particular. This address disclosed the design of a systematic scrutiny into all the abuses which had been imputed to the Anglican Church. It is evident from the king's conduct and observations with regard to it, that he favoured, and had possibly originated, the bold and novel inquiry. The ever-present difficulty of reconciling the papal pretensions with national independence is also clearly brought out. It was the divided allegiance of the bishops which especially struck Henry's mind, and which for national as well as personal reasons he was so anxious to determine. He doubtless saw that, in the impending struggle, the oaths sworn by the prelates to the pope would afford them but too ready an excuse for taking part against him (*d*).

The address of the commons was referred by the king to the bishops, with a request that they would immediately answer its charges. After some delay, the bishops replied in a lengthy document, which was handed by the king to the commons with the remark, "We think their answer will smally please you, for it seemeth to us very slender."

A few days later, "the king sent for the Speaker again, and twelve of the Commons House, having with him eight lords, and said to them, 'Well-beloved subjects! we thought that the clergy of our realm had been *our* subjects wholly, but now, we have well perceived that they be but *half our subjects;* yea, and scarce our subjects, for all the prelates, at their consecration, take an oath to the Pope clean contrary to the oath they make to us, so that they seem to be *his* subjects and not *ours*. Copies of both the oaths I deliver here to you, requiring you to invent some order that we be not thus deluded of our spiritual subjects.'"

(*d*) See A. Amos, Statutes of the Reformation Parliament, 232.

The Speaker then departed and caused the two oaths to be read in the Commons House (*e*).

Statutes in restraint of privileges and emoluments of the clergy.

Three statutes were passed in the first session in restraint of the personal privileges and emoluments of the clergy.

(1) The fees, hitherto assessed at discretion, upon the granting of probates and administration by the ecclesiastical courts were reduced to fixed and moderate proportions.

This was a mode of ecclesiastical extortion which had been long and bitterly resented. A statute of the 31st year of Edward III. (st. 1, c. 4) had been passed to repress the "outrageous and grievous fines and sums of money taken by the ministers of bishops and other ordinaries (*f*) of holy church, for the probate of testaments"; and another statute of the 3 Hen. V. c. 8 had been made temporary only by reason that "the ordinaries did then promise to reform and amend the oppressions and exactions complained of"; but as the abuse still continued, "nothing reformed nor amended but greatly augmented and increased against right and justice," it was now effectually restrained by this statute of Henry's reign (*g*).

(2) The mortuary fees, or "corse presents," of the parochial clergy were regulated. After reciting that these fees had been "over excessive to the poor people and other persons of this realm, and also had been demanded and levied for such as at the time of their death have had no property in any goods or chattels, and many times for wayfaring travelling men in the places where they have fortuned to die," the statute fixed the fees on a graduated scale, from three shillings and fourpence up to ten shillings, according to the value of the deceased person's property, but with an entire exemption in the case of married women, children, persons not keeping house, and wayfaring men (*h*).

(3) Pluralities, non-residence, farming and trading by the clergy were forbidden. It was enacted that no clergyman should thenceforth take any land to farm beyond

(*e*) Hall, cited by A. Amos, p. 233. [*Cf.* Froude, vol. i. c. 3.—Ed.]

(*f*) The term *ordinary* is generally synonymous with bishop; but it includes every ecclesiastical judge who has the regular *ordinary* jurisdiction independent of another. Co. Litt., 344.

(*g*) 21 Hen. VIII. c. 5.

(*h*) 21 Hen. VIII. c. 6.

what was absolutely necessary for the support of his own household; or should buy merchandise to sell again; or keep tanneries or brewhouses (*i*), or otherwise directly or indirectly trade for gain. Pluralities were not to be permitted with respect to benefices above the yearly value of £8; and residence was made obligatory. Papal and episcopal dispensations for pluralities and non-residence were declared illegal, and persons procuring them rendered liable to heavy penalties; but power was reserved to the king to sell such dispensations to a numerous list of chaplains (of the king, the nobility, the judges, and other officials), to the brothers and sons of temporal peers and of knights, and to persons holding the degree of doctor or bachelor of divinity or law. The crown thus acquired a powerful means—hitherto enjoyed by the pope—of influencing the lower house of convocation.

Session II. 1530-1.

In this session no statute directly aimed at either pope or clergy was passed. But in an Act for the punishment (by whipping, pillory, and loss of ears) of beggars and vagabonds, were significantly included "all proctors and pardoners going about the country without sufficient authority" (*k*). Proctors were officers of the ecclesiastical courts analogous to attorneys of the civil courts; pardoners were the itinerant vendors of indulgences and relics from the court of Rome.

Proctors and pardoners punished as vagabonds.

The clergy in a præmunire.

This was followed by the Act for the pardon of the clergy in the matter of the praemunire to which they were very harshly and unfairly held to have rendered themselves liable, in consequence of admitting the legatine authority of Cardinal Wolsey. The cardinal had been indicted in October, 1529, upon the statute of praemunire of the 16th Richard II., for having obtained bulls from Rome, which he caused to be publicly read, and by which he exercised jurisdiction and authority legatine, to the deprivation of the king's power established in his courts of justice. Wolsey had been careful to obtain the king's licence under the great seal authorising him to exercise the legatine

(*i*) The commons, in a petition to the king concerning clerical abuses, had made a particular complaint of reverend tanners and brewers. A. Amos, Statutes of Hen. VIII. p. 237.

(*k*) 22 Hen. VIII. c. 12.

authority; and although the king may be considered to have exceeded his legal right in granting such a licence, still, as the dispensing power had been continuously claimed and frequently exercised by the crown, both with respect to the statute of praemunire and others, there was equally an equitable and moral if not a legal defence to the charge (*l*). Wolsey, however, thinking it prudent not to plead his royal licence, was found guilty on his own confession; and after being plundered, received the king's pardon. It was now contended, on the ground of his conviction, that all the clergy of the realm had been guilty of praemunire, because by admitting the jurisdiction they had become, in the language of the statute, his "fautors and abettors": and the attorney-general was instructed to file an information against the whole clerical body in the Court of King's Bench. The Convocation of Canterbury hastily assembled and offered the king £100,000 in return for a full pardon. This offer the king refused to accept, unless in the preamble of their petition he was acknowledged to be "the protector and only supreme head of the church and clergy in England." After much discussion, the king finally consented to accept the acknowledgment of his supremacy with the qualifying words, "so far as the law of Christ will allow." The Convocation of York adopted the same language, and voted, for a like pardon, the sum of £18,840 (*m*).

It is remarkable in a reign when the power of the crown was at its highest, and when parliament even delegated to the king its legislative functions, that the king should have admitted his parliament to participate in the undoubted royal prerogative of pardoning offences. The usual character of a pardon granted to a whole estate of the realm may have been a reason for a special parliamentary sanction, and, moreover, until the clergy had been found guilty by a court of law a pardon from the king alone would have been in fact an exercise of the dispensing power which had already proved so poor a protection to Wolsey. But a

(*l*) It had been decided in Henry VII.'s reign, that although the king could not dispense with penalties for an act against the common law, he could do so with respect to an act prohibited by statute only. See *supra*, p. 295.

(*m*) 22 Hen. VIII. c. 15; 23 Hen. VIII. c. 19.

The laity also in a praemunire.

difficulty arose in the passage of the Bill of Pardon through the Lower House. The comprehensive words of the statute of praemunire applied not only to the clergy but to the privy council, the lords and commons, and indirectly to the whole nation, as having recognised Wolsey in his capacity as legate. The commons, therefore, fearing that the king might make the alleged praemunire an excuse for fleecing the laity as well as the clergy, boldly refused to pass the bill for the pardon of the latter, "unless all men might be included, arguing that every man who had anything to do with the cardinal was in the same case." The Speaker and a number of members subsequently waited upon the king, and in more submissive language declared "that his faithful commons sore lamented and bewailed their chance, in having occasion to think or imagine themselves out of his favour, because he had granted his most gracious pardon to his spiritual subjects for the praemunire and not to them; wherefore they most humbly besought his majesty out of his wonted goodness and clemency to include them in the same pardon." The king replied, "that he was their prince and sovereign lord, and that they ought not to restrain him of his liberty, nor compel him to show his mercy. Wherefore, since they had denied to consent to the pardon of his spiritual subjects, which he said he might give without their consent, under his great seal, he would be well advised before he pardoned them, because he would not have it look as if he was compelled to do so" (*n*). However, a pardon to the laity was signed by the king, and embodied in an Act of Parliament, by which his Majesty "of his mere notion, and of his benignity, special grace, pity, and liberality, hath granted, and *by the authority of the present parliament* granteth to *all and singular his temporal and lay subjects* and temporal bodies politic and corporate, and to every one of them, his pardon for offences against the statutes of provisors and praemunire." This pardon of a whole nation is not only one of the most extraordinary events of this extraordinary reign, but it is probably unparalleled in history. It was all the more

(*n*) Hall, cited by A. Amos, Reformation Parliament, p. 61.

preposterous from the circumstance that, in effect, the lords and commons pardoned themselves (*o*).

Session III. 1531-2.

These proceedings took place in the early part of the year 1531, while the king's representatives at Rome were still pressing, though with diminished hopes, for a favourable termination of the king's suit. In the next session of parliament, while the clergy were still under the terror of their recent narrow escape from the penalties of a praemunire, the attack upon the papal and ecclesiastical privileges was vigorously but cautiously renewed.

Act to restrain the citation of persons out of the diocese in which they reside.

(1) An Act was passed to restrain the citation of persons out of the dioceses in which they were resident. The preamble recites that a great number of the king's subjects as well men, wives, servants, as others, dwelling in divers dioceses of England and Wales, have been at many times called by citation and other processes compulsory to appear in the Arches audience and other high courts of the archbishops of this realm, far from their dwellings, and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice and for vexation than for any just cause of suit; and not appearing they are excommunicated, or at least suspended from all divine services, and can only be absolved on payment of the fees of court, and also to the "summoner, apparitor, or other light literate person" by whom they were certified to be summoned, a further sum for every mile distant from the court to the residence of the party. It was therefore enacted that, with certain exceptions, no person should be summoned out of the diocese in which he resided, and the fee for a citation was reduced from two shillings to threepence (*p*).

(*o*) Amos, p. 62. The pardon to the clergy of the province of Canterbury was by Stat. 22 Hen. VIII. c. 15, the pardon of the laity by 22 Hen. VIII. c. 16; the pardon of the clergy of York province by 23 Hen. VIII. c. 19, passed in the following session. For recent views of the praemunire thus presumed to have been incurred, and of the submission of the clergy to the king's supremacy, see Dixon, Hist. of the Church of Eng., vol. i. (1529-1537), pp. 53 *seq.*, and the Quarterly Review, Oct. 1879, Art. "The Submission of the Clergy."

(*p*) 23 Hen. VIII. c. 9.

Annates taken from the pope.

(2) Shortly afterwards an Act was passed depriving the pope of the annates, or first-fruits of benefices (*q*). It recites that "The pope's holiness, his predecessors, and the court of Rome, by long time had theretofore taken of all archbishops and bishops elected within this realm of England annates or first-fruits, which they were compelled to pay before they could receive the pope's bulls for their elections to be confirmed; but such annates had risen, grown, and increased by an uncharitable custom grounded upon no just or good title, and the payment thereof enforced by the restraint of bulls against all equity and justice: therefore the noblemen of this realm and the wise, sage, politic commons of the same, considering that the court of Rome ceaseth not to tax, take and exact the said annates—which were first suffered to be taken within this realm for the only defence of Christian people against the infidels, but now be claimed as mere duty only for lucre, against all right and conscience. . . . . And albeit that the king and all his subjects, spiritual and temporal, be as obedient, devout, catholic and humble children of God and holy church as any people be within any realm christened; yet the said exactions of annates be so intolerable and importable that it is considered and declared by the whole body of this realm now represented by all the states of the same assembled in the present parliament, that the king's Highness before Almighty God is bound, as by the duty of a good Christian prince, for the conservation of the good estate and commonwealth of this his realm, to do all that in him is, to obviate, repress and redress the said abusions and exactions of annates." It was thereupon enacted that the

Queen Anne's Bounty.

(*q*) [As early as the 6th century it was customary for the ordaining authorities to demand a fee of those advanced to any ecclesiastical preferment, which amounted sometimes even to the whole of one year's income from the benefice. The "annates" in England, which had been usually paid to the Archbishop of Canterbury, were laid claim to by Pope John XXII. (1316-34) for the space of three years, and by his successors until 1531 (Henry VIII.). At the close of the reformation the annates, as also the first-fruits or tenths, which were the tenth part of the annual profits of a church benefice, and also formerly paid to the pope, were made over to the crown; but were, in 1704, by Queen Anne, appropriated to the poorer clergy, and thus formed the so-called "Queen Anne's Bounty." *Cf.* Hardwick, Church Hist. Middle Ages (1861), p. 346, *n.* 3; and Anson, Law and Custom of the Constitution, vol. ii. pt. ii. (1908), pp. 238-240.—Ed.]

payment of annates should cease; that any bishop making such payments should forfeit all his lands and goods to the king; that if any bishop presented by the king to the pope should be letted or delayed through withholding of bulls, he should be consecrated in England by the archbishop; that every archbishop presented by the king, and from whom the pope should withhold the necessary bulls, should be consecrated by two bishops to be nominated by the king; that bishops so consecrated should be installed, accepted, and obeyed, and should enjoy their spiritualities and temporalities as completely as if they had obtained their bulls from Rome: and that any censures, excommunications, or interdicts issued in consequence by the pope should be utterly disregarded. A remarkable proviso was added, evidently with the object of influencing the pope in the negotiations for the divorce still pending at Rome. "Forasmuch as the king and the parliament did not intend to use in this or any other like cause, extremity of violence, before gentle courtesy and friendship first attempted," it was further enacted that, in order to come to an amicable composition with the pope, the king should have power to declare by his letters patent, before the beginning of the next session of parliament, "whether the premises or any part, clause or matter thereof," should be observed and take effect as a statute or not (*r*).

Session IV. 1532-3.

The fourth session of parliament began on February 4. The king had been secretly married to Anne Boleyn in the January, or November, preceding: and arrangements were in contemplation for the sentence of divorce from Catherine which Archbishop Cranmer pronounced in the ensuing May. It was probably with the view of quashing Queen Catherine's pending appeal to Rome, and also, prospectively, any appeal which she might make against the archbishop's sentence, that an Act was now passed forbidding, under the penalty of praemunire, all appeals from the spiritual judges in England to the court of the pontiff. In a curious and lengthy preamble it is recited that "By divers and sundry old authentic histories and chronicles it is manifestly declared that this realm of England is an empire,

Act for the restraint of appeals to Rome.

(*r*) 23 Hen. VIII. c. 20.

and so hath been accepted in the world, governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same; unto whom a body politic, compact of spirituality and temporality, owe next to God a natural and humbled obedience." After referring to the statutes of Edward I., Edward III., Richard II., and Henry IV., made to keep "the imperial crown of this realm from the annoyance as well of the see of Rome as from the authority of other foreign potentates" (*s*), and reciting that since those good statutes and ordinances, inconveniences and dangers not provided for plainly therein had arisen and sprung up by reason of appeals to Rome, in causes testamentary, of matrimony and divorces, tithes, oblations and obventions, not only to the great vexation, trouble, costs and charges of the king's Highness and many of his subjects, but also to the great delay and let to the true and speedy determination of the said causes, for so much as the said parties appealing to the said court of Rome, most commonly do the same for the delay of justice, it was therefore enacted: That all causes testamentary of matrimony and divorce, tithes, oblations, and obventions, already commenced or hereafter coming in contention, whether they concerned the king, his heirs or successors, or any subjects or resiants of what degree soever they be, should be heard and determined within the king's jurisdiction, and not elsewhere, in such courts, spiritual and temporal, as the case should require, any inhibitions or excommunications, or processes from the see of Rome notwithstanding: that any person procuring from Rome any foreign process should incur the penalties of praemunire: that the course of appeal should be from the archdeacon to the bishop, and from the bishop to the archbishop in his province: and that in any case touching the king or his successors, the appeal should be to the upper house of convocation (*t*).

Session V. 1533-4

Before the meeting of parliament for its fifth session, on January 15, 1533-4, Archbishop Cranmer had pronounced the divorce of Henry from Queen Catherine, the king's marriage with Anne Boleyn had been publicly acknowledged, and a final breach with the pope appeared imminent.

(*s*) *Supra*, pp. 387 *seq.* (*t*) 24 Hen. VIII. c. 12.

Act for the submission of the clergy.

(1) The first important Act passed was one for making the king's assent requisite to the validity of ecclesiastical canons, and for the more general prohibition of appeals to Rome. The clergy in convocation had already been induced to promise that they would never from thenceforth enact, promulge or execute, any new canons, constitutions, or ordinances, without the king's licence to make them and his approval of the same when made. By the present statute this submission of the clergy was recorded and confirmed, and the penalty of fine and imprisonment at the king's pleasure imposed upon all who should act contrary to its provisions. Appeals to Rome, which had been already prohibited in certain cases, were now, under penalty of a praemunire, forbidden in any case whatsoever; and in lieu of the right thus abolished it was declared that appeals from the archbishops' courts should be made to the king in chancery, and that the king should appoint commissioners to hear and determine finally in the cause (*u*).

Archbishops and bishops to be nominated by the king's *congé d'élire*.

(2) The statute of 1531, by which the payment of annates to the pope had been contingently forbidden, and which had since been ratified by the king's letters patent, was re-enacted, with additional clauses providing a mode of nominating archbishops and bishops by *congé d'élire*, which is that now in force. For the future no archbishop or bishop was to be presented to "the bishop of Rome, other-

(*u*) 25 Hen. VIII. c. 19. "An Act for the submission of the clergy to the King's Majesty." The Delegates of Appeals, as the commissioners were termed, continued to form the final court of ecclesiastical appeals, until superseded by the Judicial Committee of the Privy Council under the provisions of 2 & 3 Will. IV. c. 92. By the Supreme Court of Judicature Act, 1873, the king is empowered, at any time, by Order in Council, to direct that all appeals and petitions, which according to the laws now in force ought to be heard by the Judicial Committee of the Privy Council, shall, from and after a time to be fixed by such order, be referred to and heard by his Majesty's New Court of Appeal constituted by this Act. And the Court of Appeal, when hearing any appeals in ecclesiastical causes which may be referred to in manner aforesaid, shall be constituted of "such and so many of the judges thereof, and shall be assisted by such assessors, being archbishops and bishops of the Church of England," as shall be directed by any general rules to be made by Order in Council. 36 & 37 Vict. c. 66, sec. 21. See also the Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 85 [which created a procedure for offences against the ceremonial law of the Church; Anson, Law and Custom of the Constitution, vol. ii. pt. ii (1908), p. 279; F. Makower, Die Verfassung der Kirche in England (Berlin, 1894).—Ed.]

wise called the pope," (the expression in the previous Act was "our holy father the pope,") for confirmation, or was to sue out any bulls in his court. But at every vacancy of any cathedral church the king should grant to the dean and chapter a licence under the great seal to elect the person named in the accompanying letters missive, and him they should choose and none other. Should they defer the election for more than twelve days, the king should elect by his letters patent. The prelate so elected or nominated should first swear fealty; after which the king should signify the election to the archbishop, or if there be no archbishop, to four bishops, requiring them to confirm the election and to invest and consecrate the bishop elect, who might then sue his temporalities out of the king's hands, making a corporal oath to the king and none other, and should receive the profits spiritual and temporal belonging to his bishopric (*w*).

Payment of Peter-pence and other papal exactions forbidden.

(3) This statute was immediately succeeded by another lopping off a multitude of petty payments which the pope had been wont to exact. It is declared to be founded on the petition of the commons complaining to the king that his subjects were greatly decayed and impoverished by the intolerable exactions of the bishop and see of Rome, the specialities whereof were over long, large in number, and tedious to be particularly inserted: wherein the bishop of Rome was not only to be blamed for his usurpation of the revenues, but for his abusing and beguiling the king's subjects, –"pretendyng and perswadyng to theym that he hath full power to dispence with all humayne lawes uses and customes of all realmes in all causes which be called spirituall . . . in great derogacion of your imperiall crowne and auctorytie royall . . . where this your graces realme, recognysing noo superior under God but only your grace, hath byn and ys free frome subjeccion to any mannes lawes but only to such as have bene . . . made . . . within this realme for the welthe of the same, or to suche other as by sufferance of your grace and your progenytours the people of this your realme have taken at theire free libertie by theire owne consente to be used amonges theym,

(*w*) 25 Hen. VIII. c. 20, "An Act restraining the payment of annates," &c.

and have bounde theym selfes by longe use and custome to the observance of the same, not as to the observaunce of the lawes of any foren prynce potentate or prelate, but as to the accustomed and auncient lawes of this realme orygynally established as lawes of the same by the seid sufferance consentes and custome and none otherwyse." It was therefore enacted that Peter-pence and every other kind of payment made to the bishop of Rome, and "to hys chambres which he calleth apostolyke," and every species of licence, dispensation and grant, accustomed to be obtained at Rome, should cease; that thereafter all such licences, faculties and other writings might be granted by the Archbishop of Canterbury; that children born of marriages solemnised by virtue of an archbishop's licence should be legitimate; and that the penalties of *praemunire* should be incurred by any one suing to Rome for any licences, bulls, or instruments forbidden by the Act. It was, however, declared that the king, his nobles and subjects, did not intend by this Act to decline or vary from the congregation of Christ's church in any things concerning the very articles of the catholic faith of Christendom, or in any other things declared by Holy Scripture and the Word of God necessary for salvation. In order, doubtless, to leave open a possibility of arrangement with the pope, it was provided that this Act should not take effect till the next feast of St. John the Baptist (June 24, 1534), unless the king before that feast should declare his will that it should take effect earlier, and at all times before the said feast he was empowered to annul the whole or any part of the Act at his pleasure (*x*).

Henry's first Royal Succession Act.

(4) The first of Henry's statutes for the settlement of the royal succession was also passed in this session. Its principal enactments were: an adjudication by authority of parliament of the nullity of the king's marriage with Queen Catherine and of the validity of that with Anne Boleyn; a declaration of fourteen prohibited degrees of marriage, the tenth on the list being the marriage of a brother with a brother's widow; an entail of the crown (*y*); certain new

(*x*) 25 Hen. VIII. c. 21, "An Act for the exoneration from exactions paid to the see of Rome."

(*y*) *Supra*, p. 193.

Oaths imposed by the Act.

treasons and misprisions of treason; and an oath to observe and maintain the Act, to be taken by all subjects of full age under the penalty, on refusal, of being adjudged guilty of misprision of treason. The terms of the oath prescribed in the Act were, that the deponents would "truly, firmly and constantly, without fraud or guile, observe, fulfil, maintain, defend and keep, to their cunning, wit, and uttermost of their powers, the whole effects and contents of this present Act" (*z*). But the oath actually tendered to be taken differed very materially from that required by the statute.

Professedly drawn up in the sense of the statute, this oath was devised so as to include a virtual acknowledgment of the king's ecclesiastical supremacy, before that supremacy had been established by the legislature. In its amplified form, it included an abjuration of all faith, truth and obedience to any "foreign authority, prince or potentate"; a declaration that the deponent reputed "as vain and annihilate" any oath already made or to be made to any person or persons other than the king and the heirs of his body; and a promise not only to observe the late Act, but also "all other Acts and statutes made since the beginning of this present Parliament in confirmation or for due execution of the same." Sir Thomas More and Bishop Fisher, when called upon to take this amplified oath, which had no legislative authority, refused, and were in consequence illegally committed to prison, where they remained a long time without trial. In the next session of parliament the legal difficulty was surmounted by a special Act, by which, after reciting the oath prescribed in the Succession Act—the oath devised (but not by parliament) for the maintenance and defence of the said Act—and setting forth the tenor of such devised oath, but with further verbal alterations, it was enacted that the said last-mentioned tenor oath should "be interpreted, expounded, reported, accepted and adjudged the very oath that the king's Highness, the lords spiritual and temporal, and the commons of this present parliament meant and intended that every subject of this realm should be bound to take and

Sir Thomas More and Bishop Fisher.

(*z*) 25 Hen. VIII. c. 22.

accept" (*a*). For refusing to take this substituted oath, More and Fisher—who were willing to swear to maintain the succession as settled by parliament, but had scruples as to the preamble of the oath denying the pope's right of dispensation—were shortly after, while close prisoners in the Tower, and without being heard in their defence, attainted by Acts of Parliament of misprision of treason, and executed (*b*).

Session VI 1534.

Shortly after the close of the preceding session, the news arrived in England of the pope's adjudication annulling Cranmer's sentence of divorce. This was followed by a royal proclamation ordering "all manner of prayers, oracions, rubrics, canons, or mass-books, and all other books in churches, wherein the bishop of Rome is named, or his presumptious and proud pomp and authority preferred, utterly to be abolished, eradicate and rased out, and his name and memory to be never more (except in his contumely and reproach) remembered, but perpetually suppressed and obscured." Parliament met after the prorogation, on November 3, 1534, and sat till the 18th of the following month. (1) Its first Act was the famous Act of Supremacy. The king had already been recognised by convocation under the terror of the praemunire—"quantum per Christi licet Supremum Caput." It was now enacted (without the saving clause) that the king should be taken and reputed "the only supreme head on earth of the Church of England called *Ecclesia Anglicana*, and shall have and enjoy, annexed and united to the imperial crown of this realm, as well the title and style thereof, as all honours, dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities, to the said dignity of supreme head of the same church belonging and appertaining"; with full power to visit, reform, and correct all heresies, errors, abuses, offences, contempts and enormities which, by any manner of spiritual authority or jurisdiction, ought to be reformed or corrected (*c*). (2) The second Act of this session was that to which reference has

Royal proclamation against the pope, 9 June, 1534.

Act of Supremacy. 1534.

Oath to maintain the succession.

(*a*) 26 Hen. VIII. c. 2.

(*b*) See Amos, Statutes of the Reformation Parliament, pp. 31-36, 46-52.

(*c*) 26 Hen. VIII. c. 1, indorsed on the original, "The King's Grace to be authorised Supreme Head."

already been made, as having been passed to justify retrospectively the imprisonment of Sir Thomas More and Bishop Fisher, for not taking an oath, which it was now declared (*d*) had been meant by the legislature to be taken, although it had in fact prescribed a different oath. (3) By another Act the first-fruits and tenths of the annual income of all ecclesiastical benefices—the payment of which to the pope had been stigmatised, in the third session of this parliament, as having arisen by an uncharitable custom against all equity and justice, and as being exacted only for lucre against all rights and conscience—were "united and knit to the king's imperial crown for ever" (*e*).

First-fruits annexed to the crown.

Session VII. 1535-6.

The destruction of the papal power, emoluments, and influence in England, and the reduction of the national English Church under due subordination to the state, had now been accomplished. In its seventh and last session the Reformation Parliament commenced the "second grand innovation in the ecclesiastical polity of England"—the dissolution of the monasteries. All religious houses under the yearly value of £200 were, to the number of 376, suppressed by Act of Parliament, and all their property, real and personal, given to the king, his heirs and assigns, "to do and use therewith his or their own wills to the pleasure of Almighty God and the honour and profit of the realm" (*f*). To prepare the way for this measure, Thomas Cromwell, the king's chief minister and adviser since the death of Wolsey, had been appointed lord vicegerent of the king in all matters ecclesiastical, and at his suggestion, commissioners were nominated to make a general visitation of the monasteries. The nature of their report, which formed the basis of the subsequent legislation, is accurately described in the preamble of the Act. "Manifest sin," it is recited, "vicious, carnal, and abominable luxury, is daily used and committed in such little and small abbeys, priories and other religious houses of monks, canons, and

Dissolution of the smaller monasteries.

(*d*) 26 Hen. VIII. c. 2.

(*e*) 26 Hen. VIII. c. 3. In the following session of parliament "for the entire and hearty love that his grace bore to the prelates and other incumbents," they were excused from the tenths in the same year that they paid their first-fruits. 27 Hen. VIII. c. 8.

(*f*) 27 Hen. VIII. c. 28.

nuns. Amendment has been long tried, but their vicious living shamelessly increaseth and augmenteth." It scarcely admits of doubt that the commissioners conducted their investigations with unwarrantable harshness, and that their report is in particular cases exaggerated. It is a suspicious circumstance that all the smaller monasteries—whose suppression was alone immediately contemplated—are described as vicious, while those whose incomes rose above the hard-and-fast lines of £200 a year are not only not blamed but even praised. It looks very much as if the small and remote houses, having no one to speak in their favour, were condemned, while the larger, whose abbots could refute unfounded accusations by personal testimony from their seats in parliament, were conveniently spared till a more favourable opportunity. Yet there is no reason to doubt the substantial and general truth of the allegations of the commissioners. As religious houses were in general "exempted from episcopal visitation, and entrusted with the care of their own discipline, such abuses had gradually prevailed and gained strength by connivance, as we may naturally expect in corporate bodies of men leading almost of necessity useless and indolent lives, and in whom very indistinct views of moral obligations were combined with a great facility of violating them." And it is always to be remembered that the vices to which the report bears witness "are not only probable from the nature of such foundations, but are imputed to them by the most respectable writers of preceding ages" (*g*). Archbishop Morton, under Henry VII., had obtained a bull from the pope for the reform of the English monasteries, in which many of them were charged with dissoluteness of life; and the abbot of St. Albans was severely reprimanded by the same archbishop for the alleged scandalous vices of himself and his monks. In 1523, Cardinal Wolsey, as papal legate, commenced a visitation of the professed as well as secular clergy, in consequence of the general complaint against their manners. He also set the example of diverting the revenues of these institutions to more useful purposes, by procuring from Rome the suppression of many convents

(*g*) Hallam, Const. Hist., i. 70, 71.

in order to endow a new college at Oxford, which, after his fall, was more completely established under the name of Christ Church (*h*). Henry VIII. may have been chiefly actuated by greed of gain and by hatred to the monastic orders, who as the special protégés of the papacy were the most obstinate opponents of his ecclesiastical policy. Their widespread influence over the mass of the people rendered them dangerous enemies to a ruler whose conduct they disapproved. This is evidenced by the insurrections in Lincolnshire and Somersetshire, and the great northern rebellion, styled by the insurgents the "Pilgrimage of Grace," which broke out on the suppression of the smaller monasteries, and was imputed to the "solicitation and traitorous conspiracy of the monks and canons."

The "Pilgrimage of Grace." 1536-7.

The rebellion having been ruthlessly stamped out (*i*), Henry ventured, four years later, to dissolve the larger monasteries also, without encountering any open resistance from a terrified people. A few had already been held, contrary to every principle of the common law, to be forfeited to the crown by the attainder of their abbots for high treason. The rest were all surrendered, practically under duress. It only remained for parliament to ratify the king's title under the surrenders and forfeitures, in order to obviate any objection on the score that as all the members of a foundation possessed only life-interests in the property, they could not, either singly or collectively, confer anything more on the sovereign. An Act was

The larger monasteries dissolved. 1540.

(*h*) Hallam, Const. Hist., i. 70, 71.

(*i*) On February 22, 1537, after the rebels in the north had dispersed, the king wrote to the Duke of Norfolk: "Forasmuch as our banner is outspread and displayed, by reason whereof, till the same shall be closed again, the course of our laws must give place to the ordinances and statutes martial, our pleasure is that before you close up our said banner again, you shall in any wise, cause such dreadful execution to be done upon a good number of the inhabitants of every town, village, and hamlet, that have offended in this rebellion, as well by the hanging of them up in trees, as by the quartering of them, and the setting of their heads and quarters in every town, great and small, and all such other places, as they may be a fearful spectacle to all other hereafter that would practise any like matter: which we require you to do without pity or respect, according to our former letters." The duke was also to "cause all the monks and canons that be in anywise faulty, to be tied up, without further delay or ceremony, to the terrible example of others; wherein we think you shall do unto us high service."

accordingly passed, which, after hypocritically reciting that the abbots, priors, abbesses, and prioresses had made surrender, "of their own free and voluntary minds, goodwills, and assents, without constraint, co-action, or compulsion," vested in the king and his heirs for ever all the property, real or movable, of the religious houses "which had been already or might be hereafter dissolved, suppressed, surrendered, or had or might by any other means come into the hands of the king" (*k*).

Was the suppression of the monasteries justifiable?

However harsh and unjust may have been the mode in which, to use a modern phrase, the "disestablishment and disendowment" of the monasteries was carried out, it was a measure politic in itself, supported by the precedents of the Knights Templars under Edward II. and of the alien priories under Henry V., and fraught with benefits to the English nation. Hallam has well remarked how in many persons the violence which accompanied this great revolution excites "so just an indignation, that they either forget to ask whether the end might not have been reached by more laudable means, or condemn that end itself either as sacrilege, or at least as an atrocious violation of the rights of property." But this is not only to ignore the inherent right of the supreme authority of parliament to confiscate any property, private or corporate, lay or ecclesiastical, for reasons of which it is itself the sole judge, but also to lose sight of the important distinction between private property and corporate property with respect to the justice and expediency of their confiscation. "The law of hereditary succession," continues Hallam, "as ancient and universal as that of property itself, the law of testamentary disposition, the complement of the former, so long established in most countries as to seem a natural right, have invested the individual possessor of the soil with such a fictitious immortality, such anticipated enjoyment, as it were, of futurity, that his perpetual ownership could not be limited to the term of his own existence, without what he would justly feel as a real deprivation of property. Nor are the expectancies of

Difference between private and corporate property.

(*k*) 13 Hen. VIII. c. 13. [See F. Aidan Gasquet (now Cardinal), Henry VIII. and the English Monasteries (1898).—Ed.]

children, or other probable heirs, less real possessions, which it is a hardship, if not an absolute injury, to defeat. Yet even this hereditary claim is set aside by the laws of forfeiture, which have almost everywhere prevailed. But in estates held, as we call it, in mortmain, there is no intercommunity, no natural privity of interest, between the present possessor and those who may succeed him; and as the former cannot have any pretext for complaint, if, his own rights being preserved, the legislature should alter the course of transmission after his decease, so neither is any hardship sustained by others unless their succession has been already designated or rendered probable. Corporate property, therefore, appears to stand on a very different footing from that of private individuals; and while all infringements of the established privileges of the latter are to be sedulously avoided, and held justifiable only by the strongest motives of public expediency, we cannot but admit the full right of the legislature to new-mould and regulate the former, in all that does not involve existing interests, *upon far slighter reasons of convenience.* If Henry had been content with prohibiting the profession of religious persons for the future, and had gradually diverted their revenues instead of violently confiscating them, no protestant could have found it easy to censure his policy" (*l*).

Distribution of the church property.

The vast wealth which accrued to the crown by the dissolution of the monasteries might have rendered the king, had he been able to retain it, independent of the commons. But he was obliged to bribe all around him, to acquiesce in, and maintain a measure the accomplishment of which had been attained not without great hazard and difficulty. Some portion was expended on public works and on the foundation of six new bishopries, but the greater part was distributed among the nobles and gentry, either as gifts or by sale at low prices. The results of this policy were: (1) the new owners of monastic lands were engaged by the strongest ties of private interest to

Its results.

(*l*) Const. Hist., i. 74, 75; and see Freeman, Disestablishment and Disendowment, What are they? For a liberal Roman Catholic view, see The Home and Foreign Review, Nos. 7 and 8 (Jan. and Apr. 1864), Arts. "The Dissolution of the Monasteries" and "The Rise of the English Poor-law."

oppose the re-establishment of the papal dominion in England: (2) the territorial aristocracy were strengthened by the large intusion of wealth amongst the newly elevated and the more ancient but decayed families; and (3) land was rendered to a much greater extent than formerly an article of commerce. In connection with this latter result, it is remarkable that the very next year after the passing of the Act for the dissolution of the larger monasteries witnessed the enactment of a goodly array of laws to facilitate the transfer and enjoyment of real property, a circumstance which can scarcely be regarded as fortuitous (*m*).

Doctrines of the Anglican Church declared by Henry.

Henry had now been completely victorious in his contest with the pope: and the English clergy were so humbled and intimidated that they dared not offer any open resistance to the royal will. So far as he had advanced on the road of ecclesiastical reform, with the single exception of the confiscation of the monasteries, the king had probably been heartily supported by a majority of the nation. But there was a growing minority who were eagerly desirous of essential changes in religious faith. With these Henry had no sympathy. Concurrently with the series of political and legal changes which had been effected in the ecclesiastical system, severe measures of repression had been taken against the holders of heretical doctrines, and many had from time to time suffered for their opinions. In his new character of supreme head of the church, Henry now determined to vindicate its doctrinal orthodoxy by imposing on his people a compulsory belief in all the leading doctrines of the Roman

(*m*) A. Amos, Reformation Parliament, p. 313. Mr. Amos enumerates among the real property legislation of this year the statutes—of wills; of limitations; of fines; for conveyance of tithes; for lessees of tenants in tail; for executions upon lands; for partitions; for disseisins; for grantees of reversions; and for buying of titles. Another indirect consequence of the partition of the church lands among the laity, to which Mr. Amos also calls attention, was to promote the extinction of villeinage. Sir Thomas Smith in his Commonwealth of England (p. 3, c. 10) tells us that the clergy, while impressing upon the laity the duty of manumitting their villeins, "had a scruple in conscience to impoverish and despoil the church so much as to manumit such as were bound to their churches, or to the manors which the church had gotten," but "the monasteries coming into temporal men's hands have been occasion that now they (the villeins) be almost all manumitted."

Statute of the Six Articles. 1539.

Church. By the "Statute of the Six Articles," as it is commonly called, it was affirmed: 1. That in the Eucharist there is really present the natural body of Christ, under the forms, but without the substance, of bread and wine. 2. That communion in both kinds is not necessary to salvation. 3. That priests may not marry by the laws of God. 4. That vows of chastity ought to be observed. 5. That private masses ought to be retained in the English Church. 6. That auricular confession is expedient and necessary, and ought to be retained. The penalties for writing, preaching, or disputing against these articles were: Against the first article, death as a heretic, without the option of abjuring; against the other five, the usual penalties of felony. The Act also declared the marriages of priests or nuns utterly void, ordered any such who were married to be immediately separated, and pronounced their future cohabitation to be felony. Lastly, persons contemptuously refusing to confess at the usual times, or to receive the sacrament, were, for the first offence, to be fined and imprisoned; and for the second, to suffer the punishment of felony (*n*).

English translation of the Bible. 1538. "Institution" and "Erudition of a Christian Man."

In some other respects Henry was induced by Cromwell and Cranmer to favour protestant doctrines. An English translation of the Bible was directed to be set up in each parish church for the use of the people (*o*); and in the "Institution" and "Necessary doctrine and erudition of a Christian man"—books published by royal authority—explanations were given which, "if they did not absolutely proscribe most of the ancient opinions, threw at best much doubt upon them, and gave intimations which the people, now become attentive to these questions, were acute enough to interpret" (*p*).

EDWARD VI. 1547-1553.

The actual reformation in religion was established in the early part of the reign of Edward VI., mainly through

(*n*) 31 Hen. VIII. c. 14, "An Act for abolishing of diversity of opinion in certain articles concerning Christian religion."

(*o*) In 1543, by an Act "for the advancement of true religion" (34 Hen. VIII. c. 1), the liberty formerly granted of reading the Bible was abridged.

(*p*) Hallam, Const. Hist., i. 82. ["While on the continent streams of blood flowed on account of the creeds of the church, political negotiations were here begun for the adaptation of a 'national' doctrine of faith." Gneist, Hist. Engl. Const., 486.—Ed.]

the instrumentality of Cranmer and the protector Somerset. The first Act of Edward's first parliament (which met on November 4, 1547) directed the sacrament of the altar to be administered in both kinds, as being agreeable to primitive usage (*q*). In the following year was passed the "Act for Uniformity of Service and Administration of the Sacraments," ordaining that the "order of divine worship," contained in the Book of Common Prayer which had been drawn up by a committee of bishops and other divines appointed for that purpose, should in future be the only one to be used by all ministers in any cathedral, parish, or other church (*r*). In the same session, the

Book of Common Prayer.

(*q*) 1 Edw. VI. c. 1, An Act "against such as shall irreverently speak against the sacrament of the altar, and the receiving thereof under both kinds."

(*r*) 2 & 3 Edw. VI. c. 1. The penalties for refusing to use, or speaking or writing in derogation of, the Book of Common Prayer, were, for the first or second offence, a fine; for the third, forfeiture of goods and imprisonment for life. In 1552, a second Act of Uniformity (5 & 6 Edw. VI. c. 1) was passed, reciting that the Book of Common Prayer had been "perused, explained, and made fully perfect," and ordering the new version alone to be used. [See F. A. Gasquet and E. Bishop, Edward VI. and the Book of Common Prayer (London, 1890). The authors of this book point to the influence exercised in England during the early years of Edw. VI.'s reign by translations of Lutheran pamphlets, and seem to prove that a direct utilisation of the Mosarabic Liturgy by Cranmer was inconceivable; on the contrary, that, although the utilisation of the Greek Liturgy at the commencement prayer to the Sacrament of the Holy Communion was probable, yet, with this exception, the whole of the English Liturgy must be regarded as belonging to the category of North German Lutheran liturgies and as having been fashioned after them; in short, an adaptation of the Sarum ritual to North German models. The authors of the work in question refer to the possibility that the Liturgy was issued ready-made by the Government, without its having been sanctioned by any properly constituted body of the clergy. The ritual of the Church of England, both as regards the ornaments of the Church and the dresses and position of the officiating minister, are derived from the following sources: custom and usage, the canons of the Church and statutes of the realm (see Phillimore, Eccl. Law, 2nd ed., vol. i., pp. 706, 707). The question whether there is a common law of the Church, unwritten, living by usage though expressed by judicial decisions, is fully considered in the book referred to, and the conclusion arrived at is that there is a common law of the Church, that its rubrics are not exhaustive, and that from the mere silence of a rubric a positive prohibition cannot in all cases be inferred. See *Liddell* v. *Beal*, [1860], 14 Mo. P.C. 1; and *Martin* v. *Mackonochie*, [1868] L. R. 2 Adm. and Eccl. 116. Phillimore (*op. cit.*) treats of the general law of the Western Church as to matters of ritual, and adds (p. 705) that "no argument of the continuity of the Church of England, from the period of its first foundation in England to present times, can be stronger than that

Book of Common Prayer.

Ritual.

marriage of priests was declared lawful (*s*); and shortly afterwards images and pictures of saints in churches were ordered to be destroyed (*t*). But these changes were not carried out without considerable opposition from a part of the nation. Insurrections of a serious nature broke out in Devonshire, Norfolk, and several other counties; and religious persecution, "the deadly original sin of the reformed churches," was employed as vigorously, if not so extensively, as in the succeeding reigns of Mary and Elizabeth.

MARY. 1553-1558. Re-establishment of the papal religion.

During the short reign of Mary the papal religion was completely re-established, probably with the entire approval of a large portion, if not of a majority, of the nation, for whom the progress of the reformation doctrines had been too precipitate. All the laws made against the supremacy of the see of Rome, since the 20th year of Henry VIII., were formally repealed; but it was found impossible to restore the ecclesiastical property in the hands of subjects (*u*); and even the bill for restoring to the church the first-fruits and impropriations in the queen's hands was passed not without difficulty. The cruel and widespread persecution of the protestants under Mary, far from eradicating the reformed faith, was instrumental in promoting it. The abhorrence and disgust excited in the people against Mary and the Roman hierarchy were extended to the doctrines which they professed. "Many persons," remarks Hallam, "are said to have become protestants under Mary, who, at her coming to the throne, had retained the contrary persuasion. And the strongest proof of this may be drawn from the acquiescence of the

The Marian persecution.

which is derived from the structure, order and contents of the Prayer Book." *Cf.* also Talbot, Modern Decisions on Ritual (1894). See *infra*, p. 440, and note.—ED.]

(*s*) 2 & 3 Edw. VI. c. 21.

(*t*) 3 & 4 Edw. VI. c. 10.

(*u*) 1 & 2 Phil. and Mary, c. 8, repealing "all statutes, articles, and provisions made against the See Apostolic of Rome, since the 20th year of King Henry VIII., and for the establishment of all spiritual and ecclesiastical possessions and hereditaments conveyed to the laity." The preamble recites that "much false and erroneous doctrine hath been taught, preached and written, partly by divers the natural-born subjects of this realm, and partly being brought hither from sundry other foreign countries, had been sown and spread abroad within the same."

great body of the people in the re-establishment of protestantism by Elizabeth, when compared with the seditions and discontent on that account under Edward " (*w*).

(*w*) Const. Hist., i. 107. [" Chastened by severe trials and strengthened by faith, enlightened by examination of the Holy Scriptures (now no longer closed to the laity), the protestant religion now strikes its roots firmly into the heart of the people, attains, by a careful revision of the Prayer Book, the liturgy, and the ritual, a form sympathetic and intelligible to the great majority of the English community, and thus renders possible the re-establishment of a united church in a united nation." Gneist, Hist. Engl. Const., p. 488. See also Vaughan, Revolutions in English History; A. Amos, Observations on the Statutes of the Reformation Parliament in the reign of King Henry VIII.; and, for the constitution of the state church, Gneist, Das Englische Verwaltungsrecht, vol. ii. cap. 8. For the relation of the English Church to other Christian churches, *cf.* F. Makower, Die Verfassung der Kirche in England (Berlin, 1894), pp. 183-203.—Ed.]

CHAPTER XII.

REIGN OF ELIZABETH.

The reign of Elizabeth spans a period of very great political and religious ferment throughout Europe. It is the glory of this great queen that by her courage and wisdom, aided by the able policy of her statesmen, Cecil, Nicholas Bacon, and Walsingham, she safely guided the nation through a sea of troubles, foreign and domestic, and achieved for England a position in the foremost rank of European monarchies. In commercial and naval enterprise, in every branch of material prosperity, the country advanced with sure and rapid strides, while literature was adorned by the writings of Shakespeare, Spenser, Sidney, Hooker, and Jewel. But of constitutional progress, during the greater part of Elizabeth's reign there is little to be recorded. From her father she had inherited the arbitrary Tudor notions of the royal prerogative. Her government was eminently despotic both in church and state; and it was only at intervals that the gradually reviving spirit of liberty manifested itself in the House of Commons (*a*).

Ecclesiastical polity of Elizabeth.

A brief consideration of the principal features of Elizabeth's ecclesiastical polity — so important in its influence on later English constitutional history — will appropriately precede a discussion of the civil government during her reign.

(*a*) [For this, and the following reign, see G. W. Prothero, Select Statutes and other Constitutional Documents illustrative of the reigns of Elizabeth and James I. (Clarendon Press, 1906). This collection of constitutional documents ends where S. R. Gardiner's begins. Several of the documents have not been previously printed. But the collection as a whole, although primarily intended perhaps more for the investigator than the student, contains so much valuable matter as to require a special reference.—Ed.]

The first care of Elizabeth's first parliament—which met on January 25, 1559, about two months after her accession to the throne—was to restore the constitution and liturgy of the national church to nearly the same state in which Edward VI. had left them at his death. This was effected by the statutes commonly known as the Acts of Supremacy and Uniformity. By the Act of Supremacy, the statute of Philip and Mary (1 & 2 Phil. and Mary, c. 8), which had generally repealed all the previous statutes affecting religion, was abrogated—thus reviving the laws of King Henry VIII., which established the ecclesiastical supremacy of the crown. Act of Supremacy. 1559.

It was also particularly enacted: (1) That no foreign prince, person, prelate, state, or potentate, spiritual or temporal, shall use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within this realm, or the dominions thereof. (2) That such jurisdictions, privileges, superiorities, pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been, or may lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, contempts and enormities, shall for ever be united and annexed to the imperial crown of this realm. (3) All beneficed ecclesiastics, and all judges, justices, mayors, and other laymen holding office under the crown, were required to take the oath of supremacy and allegiance (*b*), on pain of forfeiting their benefices or offices. (4) Any person maintaining the spiritual or temporal jurisdiction of any foreign prince or prelate

(*b*) This oath, which remained unaltered till the Revolution, was thus worded: "I, A.B., do utterly testify and declare that the queen's highness is the only supreme governor of this realm, and all other her highness's dominions and countries, as well in all spiritual and ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm; and therefore I do utterly renounce and forsake all foreign jurisdictions, powers, superiorities, and authorities, and do promise that from henceforth I shall bear faith and true allegiance to the queen's highness, her heirs and lawful

should, for the first offence, forfeit all his property real and personal; for the second, incur the penalties of praemunire; and for the third offence, suffer death as a traitor. (5) The queen was also empowered to execute the ecclesiastical jurisdiction of every kind vested in her by the Act by means of commissioners appointed under the great seal for such time as she should direct (*c*). It was by virtue of this last provision that Elizabeth established, in 1583, the famous High Commission Court, which continued a powerful instrument of oppression in the hands of the crown until abolished by the Long Parliament under Charles I.

Court of High Commission, 1583.

Act of Uniformity, 1559.

By the Act of Uniformity, (1) the revised Book of Common Prayer as established by Edward VI. in 1552, was, with a few alterations and additions, revived and confirmed. (2) Any parson, vicar, or other minister, whether beneficed or not, wilfully using any but the established liturgy was to suffer, for the first offence, six months' imprisonment, and if beneficed, forfeit the profits of his benefice for a year: for the second offence, a year's imprisonment; for the third, imprisonment for life. (3) All persons absenting themselves, without lawful or reasonable excuse, from the service at their parish church on Sundays and holydays, were to be punished by ecclesiastical censures and a fine of one shilling for the use of the poor (*d*).

First-fruits and tenths restored to the crown.

By another Act of the same session, first-fruits and tenths, which the preamble states the late queen had given up, "upon certain zealous and inconvenient respects," were again vested in the crown, in order to lessen "the huge, immeasurable and inestimable charges of the royal estate" (*e*). Such religious houses as Queen Mary had

successors, and to my power shall assist and defend all jurisdictions, preeminences, privileges, and authorities, granted or belonging to the queen's highness, her heirs and successors, or united and annexed to the imperial crown of this realm."

(*c*) Eliz., c. 1, "An Act to restore to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same."

(*d*) 1 Eliz. c. 2, "An Act for the Uniformity of Common Prayer in the Church, and Administration of the Sacraments."

(*e*) 1 Eliz. c. 4.

re-founded were suppressed, and their property also given to the crown (*f*).

The Thirty-nine Articles.

In 1563 the Articles of the English Church, forty-two in number, originally drawn up in 1551 under Edward VI., were revised in Convocation, and reduced to their present number, thirty-nine: but it was not until 1571 that they were made binding upon the clergy by Act of Parliament (*g*).

These changes in religion were not effected without considerable opposition in the House of Lords, nine temporal peers and all the bishops having protested against the Bill of Uniformity establishing the Anglican liturgy; the commons, on the contrary, far from offering any opposition, were throughout Elizabeth's reign anxious for further reforms.

The reformed national church.

The formularies of the national church thus finally established, appear to have been designedly framed in a comprehensive spirit, so as to avoid giving offence to the moderate men of both the religious parties in the state. With reference to this peculiar character of the reformed national church as a compromise between the extreme parties of the old and new theology, Lord Macaulay has remarked: "She occupies a middle position between the churches of Rome and Geneva. Her doctrinal confessions and discourses, composed by protestants, set forth principles of theology in which Calvin or Knox would have found scarcely a word to disapprove. Her prayers and thanksgivings, derived from the ancient breviaries, are very generally such that Cardinal Fisher or Cardinal Pole might have heartily joined in them. . . . Nothing, however, so strongly distinguished the Church of England from other churches as the relation in which she stood to the monarchy. The king was her head. The limits of the authority which he possessed, as such, were not traced, and indeed have never yet been traced, with precision. . . . What Henry and his favourite counsellors meant, at one time, by the supremacy, was certainly nothing less than the whole power of the keys. The king was to be the

Relation in which the church stood to the crown.

(*f*) 1 Eliz. c. 24.
(*g*) 13 Eliz. c. 12.

pope of his kingdom, the vicar of God, the expositor of catholic verity, the channel of sacramental graces. He arrogated to himself the right of deciding dogmatically what was orthodox doctrine and what was heresy, of drawing up and imposing confessions of faith, and of giving religious instruction to his people. He proclaimed that all jurisdiction, spiritual as well as temporal, was derived from him alone, and that it was in his power to confer episcopal authority, and to take it away. . . . According to this system, as expounded by Cranmer, the king was the spiritual as well as the temporal chief of the nation. In both capacities his highness must have lieutenants. As he appointed civil officers to keep his seal, to collect his revenues, and to dispense justice in his name, so he appointed divines of various ranks to preach the gospel, and to administer the sacraments. These opinions the archbishop, in spite of the opposition of less courtly divines, followed out to every legitimate consequence. He held that his own spiritual functions, like the secular functions of the chancellor and treasurer, were at once determined by a demise of the crown. When Henry died, therefore, the primate and his suffragans took out fresh commissions, empowering them to ordain and govern the church till the new sovereign should think fit to order otherwise. . . . These high pretensions gave scandal to protestants as well as to catholics"; and Elizabeth "found it necessary expressly to disclaim that sacerdotal character which her father had assumed, and which, according to Cranmer, had been inseparably joined, by divine ordinance, to the regal function (*h*). . . . The queen, however, still had over the church a visitatorial power of vast and undefined extent. . . . By the royal authority alone, the prelates of the Church of England were appointed. By the royal authority alone her convocations were summoned, regulated, prorogued and dissolved. Without the royal

(*h*) The 37th article of religion, framed under Elizabeth, declares in emphatic terms, that the ministering of God's Word does not belong to princes. The title of "Head of the Church," after being used by Henry VIII., Edward VI., and for a short time by Mary also, was given up by the [last of these] sovereigns, and has not since been assumed by the Crown.

sanction her canons had no force. One of the articles of her faith was that without the royal consent no ecclesiastical council could lawfully assemble. From all her judicatures an appeal lay, in the last resort, to the sovereign, even when the question was whether an opinion ought to be accounted heretical, or whether the administration of a sacrament had been valid. Nor did the church grudge this extensive power to our princes. . . . All her traditions, all her tastes were monarchical. Loyalty became a point of professional honour among the clergy, the peculiar badge which distinguished them at once from calvinists and from papists. Both the calvinists and the papists, widely as they differed in other respects, regarded with extreme jealousy all encroachments of the temporal power on the domain of the spiritual power. Both calvinists and papists maintained that subjects might justifiably draw the sword against ungodly rulers. In France, calvinists resisted Charles IX.; papists resisted Henry IV.: both papists and calvinists resisted Henry III. In Scotland, calvinists led Mary captive. On the north of the Trent, papists took arms against the English throne. The Church of England meantime condemned both calvinists and papists, and loudly boasted that no duty was more constantly or earnestly inculcated by her than that of submission to princes" (*i*).

Oath of supremacy and the clergy.

When the oath of supremacy was tendered to the bishops, one only, Kitchin of Llandaff, was prevailed upon to take it; the rest, on refusal, were deprived of their sees (*k*). But the general body of the beneficed clergy, with the exception of a very small number, acquiesced in the new order of things and retained their livings (*l*).

(*i*) Macaulay, Hist. Eng., i. 52-58.

(*k*) It happened that ten sees were vacant at Elizabeth's accession, and fifteen more were vacated by the bishops who refused the oath of supremacy. Matthew Parker, who had been chaplain to Queen Anne Boleyn, was consecrated Archbishop of Canterbury, December 17, 1559, and before the end of 1562 all the sees, except Oxford, were filled up by men eminent for their zeal in the protestant cause, many of whom had been exiles during the Marian persecution.

(*l*) Out of a body of nearly 10,000 only about 100 dignitaries, and 80 parochial priests, resigned their benefices or were deprived. Strype's Annals, 169, cited by Hallam.

Persecuting statutes.

Throughout her reign it was the constant policy of Elizabeth to maintain her ecclesiastical supremacy, and to enforce outward conformity with the religion established by law (*m*). This policy, which is expressed in a series of persecuting and disabling Acts against Roman catholics and protestant sectaries, continued as a marked feature of our system of government for more than two centuries. The church and the throne mutually supported each other against the advocates of civil and religious freedom, and to the heat of political contests was added the bitterness of theological hatred.

Act of 1562.

The first attack upon the Romanists was made by a statute passed in 1562, "for the assurance of the queen's royal power over all estates and subjects within her dominions." The preamble recites the "perils, dishonours, and inconveniences that have resulted from the usurped power of the see of Rome, and the danger from the tautors of that usurped power, at this time grown to marvellous outrage and licentious boldness, and now requiring more sharp restraint and correction of laws than hitherto in the time of the queen's most mild and merciful reign, hath been had, used, and established." It was therefore enacted: (1) That the penalties of praemunire should be incurred by all who maintained the authority of the pope within the realm. (2) That the bishops and commissioners to be appointed under the great seal should have power to tender the oath of supremacy to, and that the same should be taken by, all persons who had ever been admitted into holy orders or to any degree in the universities; all schoolmasters and public and private teachers of children; and all barristers, attorneys, officers of the Inns of Court, and other persons engaged in the execution of the law. The penalty for the first refusal of this oath was that of praemunire, but if, after three months, there was a second tender and refusal, the offence was made high treason. (3) Every member of the House of Commons was

(*m*) Elizabeth's own words were: "She would suppress the papistical religion, that it should not grow; but would root out puritanism, and the favourers thereof." "No man should be suffered to decline, either to the right or left hand, from the drawn line limited by authority." Strype, Life of Whitgift, and Eccles. Annals, iv. 242.

to take the oath before entering upon his parliamentary functions; but it was not to be tendered to the temporal peers, in whom, although many of them were still Roman catholics, the queen declared her full confidence (*n*).

Opposition in both Houses.

This severe statute excited some opposition in both Houses of Parliament. In the Upper House, Lord Montagu delivered a speech against it which is characterised by great liberality and tolerance, virtues which in that age were rarely advocated by any party except when itself the object of persecution. "This law," said Lord Montagu, "is not necessary: forasmuch as the catholics of this realm disturb not, nor hinder the public affairs of the realm, neither spiritual nor temporal. They dispute not, they preach not, they disobey not the queen: they cause no trouble nor tumults among the people: so that no man can say that thereby the realm doth receive any hurt or damage by them. They have brought into the realm no novelties in doctrine and religion. This being true and evident, as it is indeed, there is no necessity why any new law should be made against them. . . . I do entreat," he continued, "whether it be just to make this penal statute to force the subjects of this realm to receive and believe the religion of protestants on pain of death. This I say to be a thing most unjust; for that it is repugnant to the natural liberty of men's understanding. For understanding may be persuaded but not forced." He concluded by pointing out the danger of driving the catholics to forcible resistance: "It is an easy thing to understand that a thing so unjust, and so contrary to all reason and liberty of man, cannot be put in execution but with great incommodity and difficulty. . . . To be still or dissemble may be borne and suffered for a time to keep his reckoning with God alone; but to be compelled to lie and to swear, or else to die therefor, are things that no man ought to suffer and endure. And it is to be feared, rather than to die, they will seek how to defend themselves; whereby should ensue the contrary of what every good prince and well-advised commonwealth ought to seek and pretend, that is, to keep their kingdom and government in

(*n*) 5 Eliz. c. 1.

peace" (*o*). This reasoning seems to have produced some effect on the government, although it did not prevent the passing of the statute. Archbishop Parker privately instructed the bishops to use great caution in tendering the oath of supremacy under the Act, and never to do so the second time, on which the penalty of treason might attach, without his previous authorisation. Some time afterwards, however, Horne, Bishop of Winchester, indiscreetly giving vent to his indignation against Bonner, the deprived Bishop of London, who was specially obnoxious on account of the prominent part taken by him in the Marian persecution, indicted him for refusing to take the oath of supremacy. On his trial, Bonner pleaded that Horne was not a lawful bishop, and therefore had no authority to tender the oath. The prosecution was now dropped; Bonner was suffered to return to his prison in the Marshalsea, where he had been confined since the accession of the queen; and as soon as Parliament was re-assembled, an Act was passed declaring the consecration of the archbishops and bishops, as practised since the queen's accession, "good, lawful, and perfect" (*p*).

The Bishops Act, 1566.

The Roman catholics suspected of disloyalty.

Eight years elapsed before further legislation was directed against the Roman catholics; but in the meantime several circumstances had occurred, which rendered them specially obnoxious to the government not merely as being opponents of the established religion, but as tainted with disloyalty to the queen. At first the catholics generally had attended church, and yielded an apparent conformity to the English service; but in 1563, the Council of Trent, in its last session, pronounced a condemnation of such outward conformity. This censure was industriously circulated throughout England by William Allen (*q*) and

(*o*) Strype, cited in Hallam, Const. Hist., i. 116.

(*p*) 8 Eliz. c. 1. The only irregularity in the consecration of the bishops had consisted in the use of the ordinal of Edward VI. before it had been legally re-established. As the pre-reformation [Sarum] ordinal had been abolished, and that of Edward VI. was not yet re-established, there existed at the time no form of consecration prescribed by the English law.

(*q*) Allen had been principal of St. Mary Hall, Oxford, in Mary's reign, and had gone into exile on the re-establishment of the reformed rite. He founded a seminary at Douay, where catholics of the best English families were sent to be educated, and whence a constant succession of priests passed

other priests, who now ventured to return from the voluntary banishment into which they had gone on the death of Queen Mary. The Romanists, in consequence, began to decline attendance at church; and many withdrew abroad, where they formed centres of disaffection, in which plots were constantly being hatched against Queen Elizabeth.

Elizabeth's title to the throne purely parliamentary.

The relations of Elizabeth towards her Roman catholic subjects were also materially affected by the special character of her title to the throne, and the uncertainty in which the succession was involved—an uncertainty which was increased by her repeated refusals to marry, or to agree to a parliamentary appointment of a successor. The queen's title to the throne depended absolutely on an Act of Parliament (35 Hen. VIII. c. 1), by which the crown had been settled upon her. She had also been nominated in the succession, after her sister Mary, by her father's will, and her title had been ratified by the Act passed immediately after her accession (1 Eliz. c. 3). Her right to the crown was therefore based upon the best of all titles, the will of the people expressed by their representatives in parliament. But the natural prejudice of most of the Roman catholics in favour of a monarch of their own religion, coupled with the preference felt by many for a strictly hereditary over a purely parliamentary title, led them to regard the Queen of Scots, granddaughter of Henry VIII.'s eldest sister Margaret, as having a prior right to the throne during Elizabeth's life, and in any case as its presumptive heir after her decease. Under the provisions of Henry's will executed under parliamentary authority—the succession in remainder was vested in the House of Suffolk to the postponement, if not exclusion, of the Scottish line. But the harsh and unjust condemnation of Lady Catherine Grey's private marriage with the Earl of Hertford, which Elizabeth's jealous humour procured to be pronounced early in her reign,

Roman Catholics favour Mary Queen of Scots.

into England, not only to look after the spiritual welfare of the Romanists, but to intrigue against the government. Allen was made a cardinal in 1587, wrote an admonition in favour of the projected Spanish Armada, and was rewarded by Philip II. with the Archbishopric of Mechlin. He died in 1594. Lingard, Hist. Eng., viii. 140, 442.

cast a doubt upon the legitimacy of the protestant line of Suffolk, and thus strengthened the hopes of the catholic adherents of Mary of Scotland. So early as 1563, Edmund and Arthur Pole, nephews of the late cardinal, were tried and convicted of high treason on a charge of designing to set the Queen of Scots on the throne and to re-establish Romanism in England. In 1567, Mary, having been driven from her throne, in a great measure owing to the intrigues of Elizabeth's ministers with the Scottish malcontents, escaped into England, only to endure a long imprisonment ending in a violent death. Her presence on English soil revived the hopes of the Romanists. Plots were formed for her liberation, for the invasion of England by Spain, and for the re-establishment of the Roman rite. In 1569 the Duke of Norfolk, the greatest and richest subject in England, was concerned in an extensive conspiracy, involving the deposition of the queen, his own marriage with Mary of Scotland, and the invasion of the kingdom by the Duke of Alva (*r*). Later in the same year the Earls of Northumberland and Westmoreland took up arms in the north, with the design of restoring the old religion; and at the beginning of 1570, Pope Pius V., who had secretly instigated this insurrection, published his celebrated bull, excommunicating and deposing Elizabeth, and absolving all her subjects from their oaths of fidelity and allegiance (*s*).

Bull of Pius V. 1570.

Acts of 1571.

As soon as parliament met, in April 1571, two statutes were passed in reply to the pope's bull, and as a precaution

(*r*) He was convicted of treason and executed in 1572. *Supra*, p. 375.

(*s*) "The bull of Pius V.," observes Hallam (Const. Hist., i. 137), "far more injurious in its consequences to those it was designed to serve than to Elizabeth, forms a leading epoch in the history of our English catholics. It rested upon a principle never universally acknowledged, and regarded with much jealousy by temporal governments, yet maintained in all countries by many whose zeal and ability rendered them formidable—the right vested in the supreme pontiff to depose kings for heinous crimes against the Church. One Felton affixed this bull to the gates of the Bishop of London's palace, and suffered death for the offence. So audacious a manifestation of disloyalty was imputed with little justice to the catholics at large, but might more reasonably lie at the door of those active instruments of Rome, the English refugee priests and jesuits dispersed over Flanders, and lately established at Douay, who were continually passing into the kingdom, not only to keep alive the precarious faith of the laity, but, as was generally surmised, to excite them against their sovereign."

against fresh attempts on the part of Mary's partisans. By the first of these: (1) It was made high treason to affirm that the queen was a heretic, schismatic, tyrant, infidel, or usurper of the crown: or that the common law, until altered by parliament, ought not to bind the right of the crown, or that the queen, with the authority of parliament, was not able to make laws limiting and binding the crown and the descent, inheritance, and government thereof. (2) And it was further declared to be an offence, punishable by imprisonment and forfeiture of goods, and on repetition by a praemunire, for any one during the queen's life, and before the same had been established by parliament, to affirm, print or write that any one particular person was or ought to be heir or successor of the queen, except the natural issue of her body (*t*). The second Act refers specially to the pope's recent bull, and recites that "by colour thereof wicked persons, in parts of the realm where the people, for want of good instruction, are weak, simple and ignorant, have so far wrought, that sundry simple and ignorant persons have been reconciled to the usurped authority of Rome, and to take absolution, whereby have grown great disobedience and boldness, not only to withdraw from all divine service, but thinking themselves discharged from all allegiance to the queen, wicked and unnatural rebellion hath ensued." It was therefore enacted: (1) That any person publishing any bull from Rome, or absolving and reconciling any one to the Roman church, or being so reconciled, should incur the penalties of high treason. (2) Aiders and comforters after the fact were to incur praemunire; and any person to whom absolution should be offered, and who should not disclose such offer within six weeks to some member of the privy council, was to be held guilty of misprision of treason. (3) Praemunire was also imposed upon such as brought into the realm "things called Agnus Dei, or any pictures, crosses, beads, or such-like superstitious things, hallowed and consecrated, as it is termed, by the bishop of Rome" (*u*).

(*t*) 13 Eliz. c. 1. *Supra*, p. 200. (*u*) 13 Eliz. c. 2.

Jesuit and missionary priests in England.

During an interval of ten years no further statute was passed against the Roman catholics, but the existing laws were enforced by the government in all their severity. Persecution, however, served only to excite fresh manifestations of zeal. Missionary priests were poured into the kingdom from Douay and Rome; and in 1580, a mission of the recently founded order of jesuits, under the leadership of Robert Parsons and Edmund Campion, was despatched by Pope Gregory XIII. to bring about the re-conversion of England. The government was seriously alarmed. A proclamation was issued denouncing as aiders and abettors of treason all who should harbour or conceal any jesuit or seminarist in the kingdom, and as soon as parliament met a severe Act was passed "to retain the queen's majesty's subjects in their due obedience." By this statute: (1) The former provisions making it high treason to reconcile any of her Majesty's subjects, or to be reconciled to the church of Rome, were re-enacted. (2) The celebration of the mass was made punishable with a fine of 200 marks and a year's imprisonment; hearing mass, with a fine of 100 marks and imprisonment for a like period. (3) All persons above sixteen absenting themselves from church, unless they should hear the established service at home, were to forfeit £20 a month, or, in default of payment within three months after judgment, to be imprisoned until they should conform. (4) All schoolmasters were to be licensed by the ordinary, or suffer a year's imprisonment; and persons employing them unlicensed were to forfeit £10 a month (*w*).

Act of 1580-1.

The jesuit Campion.

Shortly afterwards, the jesuit Campion and several seminary priests from Flanders, after having eluded the vigilance of the government for some time, were seized and imprisoned in the Tower. Under the pain of the rack (*x*), Campion revealed the names of several [Roman]

(*w*) 23 Eliz. c. 1. By a subsequent Act (26 Eliz. c. 6) the queen was empowered, for default of payments of the fine, to seize two-thirds of the land and all the goods of the delinquents.

Torture.

(*x*) "The common law of England . . . neither admits of torture to extort confession, nor of any penal infliction not warranted by a judicial sentence. But this law, though still sacred in the courts of justice, was set aside by the Privy Council under the Tudor line." Hallam, Const. Hist., i. 148.

catholics who had sheltered him, and who were fined and imprisoned for the offence. Failing to give satisfactory answers as to the pope's deposing power, he was tried and condemned for high treason, and executed with two other priests.

Plots against the queen's life.

Driven to desperation by the severity of the persecution, some of the more reckless spirits among the Roman catholics now began to form plots for the assassination of the queen, as a means to the elevation of Mary of Scotland to the throne. In September 1584, one Creighton, a Scottish jesuit, was captured at sea, bearing about him the heads of a plan for a Spanish invasion and the deposition or death of the queen. When parliament met in November, its first Act was one "for the security of the queen's most royal person and the continuance of the realm in peace." This statute legalised a voluntary association which had been formed shortly before, the members of which had sworn to protect the queen from assassination or to avenge her death. It also enacted that if any invasion or rebellion should be made by or for any person pretending title to the crown after the queen's decease, or if anything be compassed or imagined tending to the hurt of her person, with

Association for the queen's defence.

Though unknown to the common law, torture seems to have been occasionally employed, by special licence from the crown. Some early instances of its use are given in L. O. Pike, History of Crime, vol. i. For a description of the different kinds of torture, see Lingard, viii. 428, note (G). Coke (3 Inst., p. 35) says the rack in the Tower was introduced by the Duke of Exeter under Henry VI., whence it obtained the name of "the Duke of Exeter's daughter." He adds, "there is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in." Under James I., the torture was employed in the case of the Gunpowder Plot conspirators, and on other occasions; but on the trial of Felton (*t.* Car. I.) for the assassination of the Duke of Buckingham, when it was proposed in the Privy Council to put the accused on the rack in order to discover his accomplices, the judges (being consulted) declared unanimously that no such proceeding was allowable by the law. They equally refused, as being *ultra vires*, to add some additional punishment, at the king's request, to that which the law had ordained for murder. 3 St. Tr., 367, 571. Jardine, in his "Reading on the use of Torture," says: "The last case of torture in England, of which I can find any trace, occurred in the year 1640." [*Cf.* Maitland, Const. Hist., p. 221, who remarks: "In Edw. IV.'s reign torture begins to make its appearance, we hear of it in 1468. It never becomes part of the procedure of the ordinary courts, but a free use is made of it by Council, and the rack becomes one of our political institutions."—Ed.]

the privity of any such person, a number of peers, privy councillors, and judges, to be commissioned by the queen, should examine and give judgment on such offences and all circumstances relating thereto. All persons who should authorise such an attempt, or on whose behalf the same should be made, were declared to be incapable of ever inheriting the throne (*y*).

It was under the provisions of this statute that Mary Queen of Scots was tried and found guilty, in 1586, of having been privy to Babington's conspiracy to kill the queen, and of having herself "compassed and imagined within this realm of England divers matters tending to the hurt, death, and destruction of the royal person of our sovereign lady the queen" (*z*).

Act against the jesuits, 1585.

The second Act of the parliament of 1585 was directed against "jesuits, seminary priests, and other such-like disobedient persons." (1) All jesuits, seminary and other Roman catholic priests, whether ordained within or without the kingdom, were commanded to quit the realm within forty days, under the penalty of high treason; to aid or receive them was made felony; and any person knowing a priest to be within the kingdom and not disclosing the fact to a magistrate, was to be fined and imprisoned at the queen's pleasure. (2) All students in the Romanist seminaries who should not return within six months after proclamation to that effect, and within two days afterwards take the oath of supremacy, should be punished as traitors; persons sending children abroad without licence were to forfeit £100 for each offence, and to incur a praemunire if they sent money to any already at a seminary; the children so sent were disabled from inheriting any property from the sender (*a*).

Execution of Mary Queen of Scots, 1587.

So drastic a law as this would seem to have rendered any further penal legislation against the Roman catholics unnecessary. The execution of Mary of Scotland on

(*y*) 27 Eliz. c. 1.

(*z*) For remarks on the trial and execution of Mary of Scotland, arguing that "if not capable of complete vindication it has at least encountered a disproportioned censure," see Hallam, Const. Hist., i. 158-162.

(*a*) 27 Eliz. c. 2.

February 8, 1587, relieved the queen from the only dangerous pretender to the throne, and deprived the catholics of their last hope. The patriotism and loyalty displayed by them during the agonising crisis of the Armada would have been fitly acknowledged by some remission of penalties. But far from being relaxed, the persecution became more rigorous (*b*): and yet one more statute was passed against "popish recusants," as persons convicted for non-attendance at church were now denominated, restraining them to particular places of residence, from which they were not to travel more than five miles: and providing that if they had not goods enough to pay the monthly fine of £20 to which they were subject, they should abjure the realm, or suffer as felons (*c*).

Spanish Armada, 1588.

Act of 1593.

The perils with which the throne of Elizabeth was constantly menaced by the perpetual conspiracy of Rome and Spain against her during the greater part of her reign, and the imputation of disloyalty necessarily attaching to all strict catholics after the promulgation of the pope's deposing bull, afforded some justification for the harsh persecution to which they were subjected.

For the simultaneous persecution of the protestant nonconformists no such extenuation can be pleaded. "The puritans," as Macaulay has justly remarked, "even in the depths of the prisons to which Elizabeth had sent them, prayed, and with no simulated fervour, that she might be kept from the dagger of the assassin, that rebellion might be put down under her feet, that her arms might be victorious by sea and land. One of the most stubborn of the stubborn sect, immediately after his hand had been lopped off for an offence into which he had been hurried by his intemperate zeal, waved his hat with the hand which was still left him, and shouted, 'God save the queen!'" (*d*).

Persecution of the protestant sectaries.

(*b*) The Roman catholic martyrs under Elizabeth have been reckoned at from 191 to 204. Hallam, Const. Hist., i. 163. Of these 116 suffered death between 1588 and 1603. Lingard, viii. 295.

(*c*) 35 Eliz. c. 2.

(*d*) Hist. Eng., i. [62]. The person referred to was Thomas Stubbe, a lawyer, and brother-in-law of Cartwright, the leader of the Puritans. In 1579, the queen, much to the alarm of her protestant subjects, entered into

The reformed Anglican Church, as professedly "keeping the mean between the two extremes," had from the first been distasteful to a large body of the more zealous protestants, who were eager to discard all rites and ceremonies savouring in any degree of the Roman system of worship. During the Marian persecution many of these men sought refuge in Germany and Switzerland, where they imbibed calvinistic doctrines, and grew accustomed to a simple form of divine service and a democratic system of church government. Returning to England on the accession of Elizabeth, these exiles were dissatisfied at finding that far from proceeding in the path of reform, the queen and her ministers were inclined somewhat to recede even from the point which had been attained under Edward VI. (*e*). Though separated from the Roman communion, the Anglican reformers had by no means intended to abolish the binding nature of the authority in matters of religion, but merely to substitute one kind of authority for another. But the very fact of the separation was in its essence an assertion, however unintentional, of the right of private judgment. Having emancipated themselves by a great mental effort from the despotism of a church "strong in immemorial antiquity and catholic consent," the more ardent reformers were indignant at the attempt made to bind them anew by the authority of a church

negotiations for a marriage with the Duke of Alençon (afterwards Duke of Anjou). Stubbe ventured to remonstrate in a pamplet entitled the "Discovery of a gaping gulph in which England will be swallowed up by the French Marriage." For this pamphlet, which, very far from being a virulent libel, is written in a sensible manner and with unfeigned loyalty and affection towards the Queen, he suffered the mutilation mentioned in the text.

(*e*) The retention of vestments, instrumental music, and other features of the ancient church ceremonial, though thoroughly defensible on the grounds of decency and order, and as tending to conciliate the very large Roman party existing in the kingdom, was due in a large measure to the strong personal predilection of the queen. She manifested a very decided leaning towards the forms of worship and even to some of the doctrines of the Roman church, and resolutely opposed the marriage of the clergy. Although the marriage of bishops and priests was connived at, the queen would never consent to repeal the statute of Mary against it. Until the first year of James I., when this statute was explicitly abrogated, the offspring of clerical marriages were, in the eye of the law, illegitimate. Hallam, Const. Hist., i. 173.

which they considered to be sprung from the exercise of that right of private judgment which it now sought to suppress.

For several years the deviations of many of the clergy from the uniformity prescribed by statute were connived at by the bishops, several of whom sympathised with the puritan party. But in 1565 the queen determined to put a stop to these irregularities. At her instigation Archbishop Parker published a book of "Advertisements" to the clergy, containing strict regulations for their discipline. Shortly afterwards, Sampson, Dean of Christ Church, and Humphrey, Regius Professor of Divinity and President of Magdalen College, Oxford, two of the most eminent puritans, were deprived of their preferments: and thirty-seven of the London clergy refusing to comply with the legal ceremonies were suspended from their ministry and threatened with the punishment of deprivation. Abandoning the churches, the lay puritans in London now began to form separate conventicles. In June 1567, a congregation of more than one hundred were seized at Plumbers' Hall, and about thirty of them subjected to a year's imprisonment for their contumacy (*f*). This was the first instance of actual punishment inflicted on protestant dissenters.

Archbishop Parker's "Advertisements." 1565.

Puritan conventicles.

Hitherto the puritans had restricted their opposition to the retention of what they deemed superstitious ceremonies in the church services: but about the year 1570 attacks began to be made on the episcopal system of church government. The principal leader in this new movement was Thomas Cartwright, Lady Margaret Professor of Divinity at Cambridge, and the reputed author of an "Admonition to the Parliament," published in 1572, which demanded, in bold and contemptuous language, a reform of the various abuses alleged to exist in the established church. The puritans had many friends in the House of Commons, in the Queen's Council, and among the bishops. From time to time bills were introduced for abolishing various ecclesiastical rites and ceremonies, and even for abrogating some of the thirty-nine articles, but, mainly through the determined opposition of the queen, they were invariably

The puritans attack episcopacy.

(*f*) Lingard, viii. 73.

Archbishop Grindal sequestered from his see for declining to suppress the "Prophesyings."

withdrawn. Archbishop Grindal, who succeeded Parker in February 1576, was inclined to the views of the puritans, and for refusing to comply with the command to suppress certain meetings of the more precise clergy for prayer and exposition of Scripture, termed "Prophesyings," was sequestered from his see for five years, and only escaped deprivation by his death in 1583.

Archbishop Whitgift.

Whitgift, his successor in the primacy, was a strenuous opponent of the puritans. Under the provision of the Act of Supremacy of 1559, authorising the queen to execute her ecclesiastical jurisdiction by commissioners appointed under the great seal, several temporary commissions had been successively appointed mainly with a view to the coercion of the Roman catholics. In December, 1583, the High Commission Court was permanently established with such extensive and formidable powers as to render it a very near approach to the Roman Inquisition (*g*). Of the forty-four commissioners who composed this tribunal, twelve were prelates; and three, of whom one must be a bishop, formed a quorum. They were directed to inquire generally, as well by the oaths of twelve good and lawful men, as by witnesses, and all other means they could devise, into all matters affecting religion, such as heretical and schismatic opinions, absence from church, seditious books, slanderous words and sayings, incests, adulteries, and other immoralities; to examine all suspected persons on their oaths; to tender the oath of supremacy according to the Act of Parliament, and to punish all who should refuse to appear or to obey their orders, by excommunication, fine and imprisonment (*h*). Under these extensive powers, such of the clergy as were suspected of puritanical tendencies were summoned to take the famous oath *ex officio*. This was a technical name for a series of ecclesiastical interrogatories founded on the canon law, but utterly opposed to the maxims of the law of England, and which Lord Burleigh,

High Commission Court established, 1583.

The oath *ex officio*.

(*g*) [*Cf.* Burnet, History of the Reformation, ii. 358: also Reeves, Hist. of the English Law, iii. pp. 788-792. Gneist, Hist. of Eng. Const., p. 495, note, remarks, "Its constitution is what is in Germany known as the *Consistorial-Verfassung*, which, by the formation of courts composed of legal, administrative and ecclesiastical members, maintains the connection between secular and clerical rule."—Ed.]

(*h*) Neal, Hist. Puritans, i. 409 *seq.*; Strype, Annals, iii. 180.

who strongly disapproved of the proceeding, described as "so curiously penned, so full of branches, and circumstances, as he thought the inquisitors of Spain used not so many questions to comprehend and to trap their preys" (*i*).

Instead of producing conformity, the rigorous proceedings of the High Commission Court only served to exasperate the sectaries still more against the hierarchy. Declamatory and scurrilous pamphlets directed against the bishops, of which the most notable was a series published under the pseudonym of "Martin Mar-Prelate," rapidly issued from the press and obtained a wide popularity.

"Martin Mar-Prelate" pamphlets.

An Act had been passed in 1581, levelled at the writings of the seminary priests, by which it was made a capital felony "to write, print, or set forth any manner of book, rhyme, ballad, letter or writing, containing any false or seditious matter to the defamation of the queen's majesty, or the encouraging of insurrection or rebellion within the realm" (*k*). By a strained construction of the judges it was held that the puritanical "libels," as they were termed, tending to subvert the constitution of the church and the ecclesiastical supremacy of the queen, were seditious, and punishable under the Act. Of the most conspicuous victims, Udal, a puritan minister, was convicted for an alleged libel on the bishops in 1591, and sentenced to death. The extreme penalty was remitted, on the intercession of Whitgift, but the prisoner soon died from the severity of his confinement. In 1593, Henry Barrow, a lawyer, and John Greenwood, a clergyman, were convicted and executed for writing "sundry seditious books, tending to the slander of the queen and state": and the same year, Henry Penry, a young Welsh clergyman, who was strongly suspected of being one of the authors of the Martin Mar-Prelate tracts, was tried for "seditious words, and rumours against the queen." Although the only evidence against him consisted of certain unconnected sentences discovered among his private papers and which had never been communicated to any other person, he was found guilty, and executed with great haste and cruelty (*l*).

Puritan "libellers" punished with death.

(*i*) Strype's Whitgift, 157.

(*k*) 23 Eliz. c. 2.

(*l*) Lingard, viii. 304.

Influence of Scottish ecclesiastical affairs on England.

The position of ecclesiastical affairs in Scotland was at once an encouragement to the English puritans to persevere in their efforts and an incentive to Elizabeth and her councillors to enforce strict uniformity. The Scottish Reformed Church, as established in 1560, though retaining a nominal form of episcopacy, approached very early to the system of church polity advocated by the puritans, and in 1592 episcopacy was abolished altogether. About the same time a serious attempt was made, under the leadership of Cartwright, to set up the presbyterian system in England. Cartwright and nine of his associates were summoned before the High Commission Court, and, refusing to answer interrogatories under the oath *ex officio*, were committed to prison. In the Star Chamber—a tribunal possessing more extended powers of punishment—they still persisted in their refusal to incriminate themselves, as being contrary to the law of the land. Although it was contemplated at one time to send them into perpetual banishment, more moderate counsels prevailed, and they were ultimately liberated on bail, after satisfying the Court on the question of the queen's supremacy.

Act of 1593 against protestant nonconformists.

The favour with which the puritans were regarded in the Queen's Council, and especially in the House of Commons, had hitherto prevented any special legislation against them. But in 1593, parliament was induced to pass an Act subjecting protestant nonconformists to penalties similar to those already imposed upon popish recusants. All persons above the age of sixteen denying or impugning the queen's supremacy, or obstinately refusing to come to the church established by law, or attending "any assemblies, conventicles, or meetings, under colour or pretence of the exercise of religion," were to be imprisoned until they should openly conform. Failing to conform within three months they were to abjure the realm, and for refusal to do so, or for returning after abjuration without licence, the punishment was to suffer death as a felon (*m*).

Political results of the persecution of the puritans.

The persecuting policy adopted by Elizabeth against the puritans had most important political results. "It found

(*m*) 35 Eliz. c. 1, "An Act to retain the queen's majesty's subjects in their due obedience."

them a sect; it made them a faction. To their hatred of the church was now added hatred of the crown. The two sentiments were intermingled; and each embittered the other" (*n*). During the closing years of Elizabeth's reign, and throughout the Stuart period, the firmest champions of constitutional liberty against the arbitrary exercise of royal power were drawn from the puritan ranks (*o*).

Civil government of Elizabeth

The ecclesiastical despotism of Elizabeth was, at least, a legal despotism, based on the extraordinary powers which parliament in its wisdom had seen fit to confer upon the crown. Religious liberty indeed was as yet totally unrecognised by the constitution, either in theory or in practice (*p*): for the crown was still regarded as the whole nation in its religious aspect, though in fact the church and the nation were ceasing to be co-extensive. But the despotic acts of Elizabeth's civil government, though there was some excuse for them in the perils and dangers by which she was surrounded, and in the example of her immediate predecessors of the Tudor dynasty, were undoubtedly illegal, and known

(*n*) Macaulay, Hist. Eng., i. [60].

(*o*) "The slavish parliament of Henry VIII. grew into the murmuring parliament of Queen Elizabeth, the mutinous parliament of James I., and the rebellious parliament of Charles I. The steps were many, but the energy was one—the growth of the English middle class, using that word in its most inclusive sense, and its animation under the influence of protestantism. No one, I think, can doubt that Lord Macaulay is right in saying that political causes would not alone have then provoked such a resistance to the sovereign, unless propelled by religious theory. . . . Gradually, a strong evangelistic spirit (as we should now speak), and a still stronger anti-papal spirit, entered into the middle sort of Englishmen, and added to that force, fibre, and substance which they have never wanted, an ideal warmth and fervour which they have almost always wanted." Bagehot, Eng. Const., 282.

(*p*) "At the end of the 16th century, the simple proposition, that men for holding or declaring heterodox opinions in religion should not be burned alive, or otherwise put to death, was itself little else than a sort of heterodoxy; and, though many privately must have been persuaded of its truth, the protestant churches were as far from acknowledging it as that of Rome. No one had yet pretended to assert the general right of religious worship, which, in fact, was rarely or never conceded to the Romanists in a protestant country, though the Huguenots shed oceans of blood to secure the same privilege for themselves." Hallam, Literature of Eur., i. 559. "Even at the close of the 17th century, Bossuet was able to maintain that the right of the civil magistrate to punish religious error was one of the points on which both churches agreed; and he added that he only knew two bodies of Christians who denied it. They were the Socinians and the Anabaptists." Lecky, Rationalism in Europe, ii. 59.

to be so by those who nevertheless submitted to them. Protests were from time to time uttered in parliament, at first feebly and ineffectually, but gradually becoming more vigorous, until by the end of her reign the opposition in the House of Commons was sufficiently strong and organised to compel the Queen and her ministers to defer to its wishes.

Political trials unjustly conducted.

The administration of justice in all trials partaking in any degree of a political nature was characterised by that iniquitous straining of law and evidence in favour of the crown which was the common feature of all the Tudor reigns, and attained a still more disgraceful notoriety under the Stuarts. Hallam has denounced in eloquent language "those glaring transgressions of natural as well as positive law, that rendered our courts of justice in cases of treason little better than the caverns of murderers. Whoever was arraigned at their bar was almost certain to meet a virulent prosecutor, a judge hardly distinguishable from the prosecutor except by his ermine, and a passive pusillanimous jury" (*q*). The trials of Stubbe, of Penry, and of Udal, already referred to, are samples of the kind of justice meted out by the legal tribunals to all who were obnoxious to the court (*r*). But besides the ordinary judicial tribunals there existed the two courts of High Commission and Star Chamber, respectively taking cognisance of all offences against the ecclesiastical supremacy and the royal prerogative of the sovereign; special courts of commissioners occasionally appointed for the trial of offences; and the courts-martial by which the queen frequently superseded the operation of the common law. During a period of actual rebellion all governments have been wont to exercise the right of suspending the ordinary course of justice in favour of the more summary and awe-inspiring military tribunal. A royal proclamation, issued on July 1, 1588, in the crisis of the Spanish invasion, directing that all persons importing or dispersing papal bulls, or disloyal or traitorous books, should be instantly proceeded against and punished by martial law, was fairly justified, however unconstitutional in character, by the extraordinary perils of the time. But the hasty and arbitrary temper of Eliza-

Courts-martial.

(*q*) Const. Hist., i. 231.

(*r*) *Supra*, pp. 439 *seq.*

beth led her to have recourse to this summary process when there existed no justification in the circumstances of the time. In 1573, one Peter Burchell, a puritan, who was probably insane, attempted to murder the famous sea-captain John Hawkins, in mistake for Sir Christopher Hatton, the captain of the queen's guard. Elizabeth wished to have him immediately executed by martial law, and was with great difficulty persuaded by her council to allow the civil jurisdiction to take its ordinary course (*s*). A much more violent and illegal proceeding took place in July, 1595. A street broil, devoid of all political character, having taken place one Sunday evening, between some riotous apprentices and the warders of the Tower, the queen issued a commission to Sir Thomas Wyllford, appointing him provost-marshal, with power to punish by martial law. He was empowered "to repair to all common highways near to the city, which any vagrant persons do haunt, and with the assistance of justices and constables, to apprehend all such vagrant and suspected persons, and them to deliver to the said justices, by them to be committed and examined of the causes of their wandering, and finding them notoriously culpable in their unlawful manner of life, as incorrigible, and so certified by the said justices, to cause to be executed upon the gallows or gibbet some of them that are so found most notorious and incorrigible offenders" (*t*).

Illegal commitments.

Another intolerable grievance by which the people were oppressed under Elizabeth was the discretionary power which the queen, and each member of her Privy Council, arrogated to themselves of committing to prison all persons who were on any account obnoxious to the court. Every obstacle was thrown in the way of a prisoner suing out a writ of habeas corpus; and even when liberty had been obtained by order of a court of law, the person so discharged was frequently re-committed by order of the council, while the officers of the court were imprisoned for having executed their duty. So flagrant were these abuses that, in 1591,

Remonstrance of the judges against them. 1591.

(*s*) Strype, Ann., ii. 288. While imprisoned in the Tower, Burchell murdered one of his keepers, for which offence he was hanged in due course of law.

(*t*) Rymer, xvi. 279. Five of the apprentices were executed as traitors on Tower Hill, July 24.

the judges ventured to present a joint remonstrance to Sir Christopher Hatton, Lord Chancellor, Sir William Cecil, Lord Burleigh, the treasurer. They desired that "order may be taken that her highness's subjects may not be committed or detained in prison, by commandment of any nobleman or councillor, against the laws of the realm, to the grievous charges and oppression of her Majesty's said subjects." "For divers," the remonstrance continues, "have been imprisoned for suing ordinary actions and suits at the common law, until they will leave the same, or against their wills put their matter to order, although some time it be after judgment and accusation. *Item:* Others have been committed and detained in prison upon such commandment against the law; and upon the queen's writ in that behalf, no cause sufficient hath been certified or returned. *Item:* Some of the parties so committed and detained in prison after they have, by the queen's writ, been lawfully discharged in court, have been eftsoones recommitted to prison in secret places, and not in common and ordinary known prisons, as the Marshalsea, Fleet, King's Bench, Gatehouse, nor the custody of any sheriff, so as, upon complaint made for their delivery, the queen's court cannot learn to whom to award her Majesty's writ, without which justice cannot be done. *Item:* Divers serjeants of London and officers have been many times committed to prison for lawful execution of her Majesty's writs out of the King's Bench, Common Pleas, and other courts, to their great charges and oppression, whereby they are put in such fear as they dare not execute the queen's process. *Item:* Divers have been sent for by pursuivants for private causes, some of them dwelling far distant from London, and compelled to pay to the pursuivants great sums of money against the law, and have been committed to prison till they would release the lawful benefit of their suits, judgments or executions, for remedie, in which behalf we are almost daily called upon to minister justice according to law, whereunto we are bound by our office and oath." Thus far the remonstrance of the judges, having regard to the fact that they were removable from office at the queen's pleasure, is a remarkably outspoken vindication of the right of personal freedom. But it concludes rather tamely,

by leaving to the executive government a great and dangerous latitude wholly inconsistent with the chartered liberties of the people. "Whereas," the judges continue, "it pleased your lordships to will divers of us to set down when a prisoner sent to custody by her Majesty, her council, or some one or two of them, is to be detained in prison and not to be delivered by her Majesty's courts or judges: We think that, if any person shall be committed *by her Majesty's special commandment, or by order from the council-board*, or for treason touching her Majesty's person, which causes being generally returned into any court, *is good cause for the same court to leave the person committed in custody*" (*u*).

Illegal proclamations.

The royal proclamations put forth under Elizabeth seem to show that the crown then claimed not merely a kind of supplemental right of legislation, to perfect and carry out what the spirit of existing laws might require, but also "a paramount supremacy, called sometimes the king's absolute or sovereign power which sanctioned commands beyond the legal prerogative, for the sake of public safety, whenever the council might judge that to be in hazard" (*w*). New offences, unknown to the common law, and affecting the persons and property of whole classes of the queen's subjects, were from time to time constituted by royal proclamation alone, and made punishable with fine and imprisonment (*x*).

Restrictions on printing and bookselling.

The Press was placed under a strict censorship, and in 1585, at the instigation of Archbishop Whitgift, the trades of printing and bookselling were subjected to most stringent regulations by an ordinance of the Star Chamber, published to restrain the "enormities and abuses of disorderly persons professing the art of printing and selling books" (*y*).

(*u*) Lansdowne MS., lviii. 87, Brit. Mus., cited in Hallam, Const. Hist., i. 235.

(*w*) Hallam, Const. Hist., i. 237.

(*x*) Hume goes so far as to assert, referring to the reign of Elizabeth, that "in reality the Crown possessed the full legislative power by means of proclamations, which might affect any matter even of the greatest importance, and which the Star Chamber took care to see more vigorously executed than the laws themselves. The motives for these proclamations were sometimes frivolous and even ridiculous."—Hist. Eng., v. 463.

(*y*) Strype, Whitgift, 222, Appendix, 94. [*Cf.* Gneist, Const. Hist. of Engl., p. 499, on the censorship of the press. "In the exercise of the

Revenue of Elizabeth.

The frugality of Elizabeth, and the sums which she received from the fines of recusants and from the grant of monopolies for the exclusive sale of commodities, enabled her to avoid frequent applications to parliament for money. This greatly increased her popularity, and caused subsidies to be granted, when applied for, with both liberality and readiness. She indeed occasionally had recourse to the ancient practice of forced loans from the wealthy, notwithstanding the statute of Richard III. against them. But she is honourably distinguished from her predecessors by the moderation and tact with which these loans were exacted and by her punctuality and speed in repayment (*z*).

censorship of the press," the author remarks, "the Privy Council, after the invention of printing, issued frequent ordinances against the publication of books and regulating their sale. According to an ordinance of Mary, the possession of heretical or highly treasonable books is declared to be rebellious and punishable according to martial law. According to the ordinance of 1559, no one was allowed to print a book or paper without the previous licence of the Privy Council or of a bishop, and, on the other side, the possession of catholic controversial writings was regarded as equally punishable. In 1585 the Privy Council issued more rigorous ordinances for the regulation of the press, the registration of all printing presses, the prohibition of all printing except in London, saving a single printing press allowed each of the two university towns. No one shall print a book, or aught else, until it has been seen, read, and approved by the Archbishop of Canterbury or the Bishop of London. The printers of statutes must obtain the imprimatur of the justices. The sale of writings otherwise printed is punishable by imprisonment, and the Stationers' Company is empowered to have all the houses and shops of printers and sellers searched, to seize all books printed in disobedience to these ordinances, to destroy the presses, to arrest the delinquents and bring them before the Council. Thus even, under the Tudors, the weapon of press censorship was employed for the purposes of restriction." "The censorship of the press was first assumed in England, as in the rest of Europe, by the Church, which suffered nothing to be published without the imprimatur of the licenser. After the reformation this high function passed from the Church to the State. As a royal prerogative the crown undertook to exercise it through the Star Chamber." Taylor, Engl. Const., ii. 181, note. See *infra*, chap. xvii., sec. 5.—Ed.]

(*z*) "In the time of Queen Elizabeth," said Mr. Justice Hutton, in his judgment in the case of Ship Money, "in the end of her reign, whether through covetousness or by reason of the wars which came upon her, I know not by what counsel, she desired benevolence; the statute of 2d Richard III. was pressed, yet it went so far that by commission and direction money was gathered in every Inn of Court; and I myself, for my part, paid twenty shillings. But when the queen was informed by her judges that this kind of proceeding was against law, she gave directions to pay all such sums as were collected back; and so I (as all the rest of our house, and as I think of other houses too) had my twenty shillings repaid me

Very much of the credit, and a fair share of the odium, attaching to the government of Elizabeth, are of right due, not to her personally, but to the policy of her ministers, among whom, Sir William Cecil, Lord Burleigh, stands pre-eminent. Under his administration England, it has been said, "was managed as if it had been the household and estate of a nobleman under a strict and prying steward. It was a main part of his system to keep alive in the English gentry a persuasion that his eye was upon them. No minister was ever more exempt from that false security which is the usual weakness of a court. His failing was rather a bias towards suspicion and timidity; there were times, at least, in which his strength of mind seems to have almost deserted him through a sense of the perils of his sovereign and country. But those perils appear less to us, who know how the vessel outrode them, than they could do to one harassed by continual informations of those numerous spies whom he employed both at home and abroad. The one word of Burleigh's policy was 'prevention'; and this was dictated by a consciousness of wanting an armed force or money to support it, as well as by some uncertainty as to the public spirit in respect at least of religion. But a government that directs its chief attention to prevent offences against itself is in its very nature incompatible with that absence of restraint, that immunity from suspicion, in which civil liberty, as a tangible possession, may be said to consist. It appears probable that Elizabeth's administration carried too far, even as a matter of policy, this precautionary system upon which they founded the penal code against popery; and we may surely point to a contrast very advantageous to our modern constitution in the lenient treatment which the Jacobite faction experienced from the princes of the House of Hanover. She reigned, however, in a period of real difficulty and danger. At such seasons few ministers will abstain from arbitrary actions, except those who are not strong enough to practise them" (*a*).

Burleigh's administration.

again; and privy councillors were sent down to all parts, to tell them that it was for the defence of the realm, and it should be repaid them again." State Trials, iii. 1199.

(*a*) Hallam, Const. Hist., i. 247.

Puritan ascendancy in the House of Commons.

Throughout the reign of Elizabeth the predominant party in the House of Commons was composed of members more or less imbued with the puritan doctrines. Amongst them were many bold and active spirits, well read in constitutional lore, who gradually organised an opposition to the despotism of the crown, and on several occasions successfully resisted all the efforts of the court party.

Conflicts with the crown: (1) As to settlement of the succession.

The two principal subjects upon which conflicts arose between the crown and parliament were the settlement of the succession to the throne, and a further reformation in the established church. At first the efforts of the commons were directed towards urging the queen to marry, a request to which she always returned evasive answers. As the hope of her marriage grew fainter, and the fears of the popular party increased lest the claim of Mary Queen of Scots should be preferred to the title of the House of Suffolk, parliament became more urgent for some "proclamation of certainty already provided," alluding to the settlement of the succession under Henry VIII.'s will, "or else by limitations of certainty if none be," by means of a fresh parliamentary settlement (*b*). The queen resolutely declined to pronounce between the conflicting claimants to the throne; a policy in which she appears to have been supported by Cecil, who thought that no limitation of the crown could at that time be effected without great peril to the state. In 1566 this question gave rise to one of the most serious conflicts between the crown and the commons which had arisen since the days of Henry IV. Both houses of parliament united to importune the queen to give way. In both very bold language was employed, and some peers, members of the queen's council, are even said to have insisted in their places that her Majesty ought to be compelled to take a husband, or else that a successor should be declared by parliament against her will. Elizabeth met the attack with boldness and tact. The recalcitrant peers were excluded from her presence until they had made submission, and the commons were induced, by the ministers in their house, to modify their request that the queen name her successor, by coupling with it an

(*b*) D'Ewes' Journal, p. 82.

alternative request that she would take to herself a husband. To this she returned a vague but courteous answer. The commons, however, were not satisfied, and continued to discuss the question of the succession. The queen at length positively enjoined them, through the Speaker, to proceed no farther in the business. Hereupon a member, Paul Wentworth, moved to know whether the queen's command and inhibition were not against their liberties and privileges. Lengthened debates ensued, and at the expiration of several days the queen, finding it advisable to give way, informed the Speaker, that she revoked her former commandment and inhibition; "which revocation," says the Journal, "was taken by the House most joyfully with hearty prayer and thanks for the same" (*c*).

Five years elapsed before the queen summoned another parliament. At its meeting in April 1571, the lord keeper Bacon, in replying to the Speaker's customary demand of freedom of speech, said that "her Majesty having experience of late of some disorder and certain offences, which, though they were not punished, yet were they offences still, and so must be accounted, they would therefore do well to meddle with no matters of state but such as should be propounded unto them, and to occupy themselves in other matters concerning the commonwealth" (*d*).

(2) As to ecclesiastical reforms. 1571.

Silenced for a time on the question of the succession, the commons now turned their attention to another topic equally obnoxious to the queen. In this session no fewer than seven bills were introduced in the lower house for a further reformation of ecclesiastical affairs. Elizabeth was indignant at this interference with her supremacy, and Strickland, the mover of the bills, was sent for to the council and ordered not to appear again in his place in parliament. This proceeding was noticed in the House as being a violation of parliamentary privilege, and an injury not merely to himself but to his constituents whom he represented. The ministers endeavoured to excuse his detention on the ground that it was occasioned not by anything spoken in the House, but by his having introduced

(*c*) Hallam, Const. Hist., i. 251.

(*d*) D'Ewes' Journal, p. 141.

bills against the prerogative of the queen. Mr. Yelverton, however, maintained that although the queen's prerogative was to be upheld, it ought to be confined within reasonable limits; that as the queen could not make the law so she had no right to break it; and that as that House, where all things came to be considered, could determine the right to the crown—which it would be high treason to deny—it could certainly entertain motions respecting religious ceremonies. Seeing the resolute attitude of the House, the queen prudently permitted Strickland to return to his place (*e*). This was an important victory for the commons, who thenceforth displayed increased confidence in asserting their privileges against the arbitrary pretensions of the crown.

(3) As to privileges of the commons.

In the parliament of 1572 no opposition was shown; but at its next meeting, in February, 1575-6, a speech of remarkable boldness in defence of the liberties and privileges of the commons was delivered by Peter Wentworth, member for Tregony, in Cornwall—a brother or other near relative of the Paul Wentworth who had earlier distinguished himself in the same cause. "Sweet is the name," he said, "of liberty; but the thing itself a value beyond all inestimable treasure. So much the more it behoveth us to take care lest we, contenting ourselves with the sweetness of the name, lose and forgo the thing." "In the last and preceding session," he continued, "I saw the liberty of free speech so much and so many ways infringed, and so many abuses offered to this honourable council, as hath much grieved me; wherefore I do think it expedient to open the commodities that grow to the prince and state by free speech. Without this it is a scorn and mockery to call it a parliament house; for in truth it is a school of flattery and dissimulation. Two things do great hurt here: one a rumour which runneth about the House, 'Take heed what you do; the queen's Majesty liketh not such a matter; whosoever preferreth it, she will be offended with him.' On the contrary, 'Her Majesty liketh of such a matter; whosoever speaketh against it, she will be much offended with him.' The other is a message

(*e*) D'Ewes, 156, 175, 176.

sometimes brought into the House, either of commanding or inhibiting very injurious to the freedom of speech and consultation. I would to God, Mr. Speaker, that these two were buried in hell; the king hath no peer or equal in the kingdom: but he ought to be under God and the law, because the law maketh him a king. A message was brought last session into the House, that we should not deal in any matters of religion, but first to receive from the bishops. Surely this was a doleful message, for it was as much as to say, ye shall not deal in God's causes." He proceeded to express great indignation at the queen's refusal to assent to the attainder of Mary of Scotland; boldly exclaimed, "None is without fault, no, not our noble queen, but has committed great and dangerous faults to herself"; rudely, but withal loyally, accused her Majesty of ingratitude and unkindness towards her subjects; and declared that his only object was "the advancement of God's glory, an honourable sovereign's safety and a sure defence of this noble isle of England, by maintaining the liberties of this honourable council, the fountain from whence all these do spring" (*f*). This direct attack upon the queen alarmed the House of Commons. They deemed it prudent to anticipate any action from without by sequestering Wentworth, and appointing a committee of all the privy councillors in the House to examine him. On being assured that the committee sat not as councillors but as members of the commons only, he submitted to their authority, and, on their report to the House, was committed to the Tower. After a month's confinement, the queen informed the commons that she had remitted her displeasure against him, and the House, having first exacted an acknowledgment of his fault upon his knees, released him with a reprimand from the Speaker.

Twelve years later Peter Wentworth again suffered imprisonment for his bold resistance to the queen's interference with the liberty of parliament. In February, 1587-8, a Mr. Cope submitted to the House of Commons a very sweeping measure of ecclesiastical reform, consisting of a bill and a book. By the bill it was proposed to annul

Cope's Bill and Book, 1588.

(*f*) D'Ewes, 236; Parl. or Const. Hist. of Eng. to the Restoration, iv. 186. [1st ed., pp. 1751 *seq.*]

all laws affecting ecclesiastical government then in force, and to establish a new form of Common Prayer, which was contained in the book annexed. The Speaker ineffectually endeavoured to stop the reading of the bill by alleging the queen's commands not to meddle in the matter. A day was passed in discussing the question; but before the next meeting of the House, her Majesty sent for the Speaker and obtained from him both bill and book. As soon as the House reassembled, Peter Wentworth submitted to the Speaker, for the purpose of being read to the House, a series of questions, of which the principal points were: "Whether this House be not a place for any member freely and without controlment of any person, or danger of laws, by bill or speech, to alter any of the griefs of the commonwealth? Whether honour may be done to God, and benefit and service to the prince and state, without free speech? Whether there be any councils besides parliament, which can make, add to, or diminish from, the laws of the realm? Whether it be not against the orders of this House to make any secret or matter of weight, here in hand, known to the prince or any other? Whether the Speaker, or any other, may interrupt any member in his speech in this House, or rise when he will without consent of the House, or overrule the House? Whether the prince and state can continue, stand, and be maintained, without the parliament, except by altering the government of the state?" For these queries (which the Speaker declined to read to the House), Wentworth was again committed to the Tower: a fate which Cope and those members who had supported his motion also shared. At the dissolution of parliament, three weeks afterwards, they were released (*g*).

Parliament of 1593.

Elizabeth's definition of liberty of speech.

At the opening of the parliament which met in February, 1593, the Speaker having made the usual request of liberty of speech, received for answer: "Privilege of speech is granted, but you must know what privilege ye have; not to speak every one what he listeth, or what cometh into his brain to utter; your privilege is *Ay* or *No*" (*h*).

(*g*) Parl. or Const. Hist., iv. 316; D'Ewes, 410.
(*h*) Parl. or Const. Hist., iv. 349.

On the first day of the session the undaunted Peter Wentworth, together with Sir Henry Bromley, another member, delivered a petition to the lord keeper desiring the lords to be suppliants with the lower house to her Majesty to entail the succession of the crown, for which they had already prepared a bill. For this boldness they were summoned before the council and committed to prison (*i*).

The Succession question again brought forward by Peter Wentworth.

A few days later, Morice, the attorney of the Court of Wards, introduced a bill to reform the practice of the ecclesiastical courts, especially in the matter of the oath *ex officio*. The queen immediately sent for the Speaker, who on his return informed the House that "she wondered that any would be of so high commandment as to attempt a thing contrary to that which she had so expressly forbidden. Her Majesty's present charge and command is, that no bills touching matters of state, or reformation in causes ecclesiastical, be exhibited. And upon my allegiance I am commanded, if any such bill be exhibited, not to read it." Not content with this general reprimand, Morice himself was arrested in his place, committed to prison, deprived of his office in the Court of Wards, and disabled from practising as a barrister (*k*).

Bill for reform of the ecclesiastical courts introduced.

The submissiveness with which the majority of the commons for so many years bowed to the haughty words and harsh acts of Elizabeth, was due in a great measure not to ignorance of their unconstitutional character or a lack of spirit to resist, but to a deep conviction of the perils and dangers which threatened the reformed church and the national independence, coupled with a firm reliance on the patriotic courage and wisdom of the queen. For these reasons, during the greater part of her reign, "the puritans in the House of Commons, though sometimes mutinous, felt no disposition to array themselves in systematic opposition to the government. But, when the defeat of the Armada, the successful resistance of the United Provinces to the Spanish power, the firm establishment of Henry IV. on the throne of France, and the death of Philip II., had secured the state and the church against all danger from

Causes of the general submissiveness of the Commons.

(*i*) Parl. or Const. Hist., iv. 365.
(*k*) *Id.* iv. 396; Townsend, 60; d'Ewes, 478; Neal. Hist. Purit., c. viii.

Opposition to monopolies, 1601.

abroad, an obstinate struggle, destined to last through several generations, instantly began at home. It was in the parliament of 1601 that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory" (*l*). The conflict arose concerning the enormous abuse of monopolies. Under cover of the loosely defined prerogative possessed or assumed by the crown of regulating all matters relating to commerce, the queen had taken upon herself to make lavish grants to her courtiers, of patents to deal exclusively in a multitude of articles, mostly common necessaries of life. Coal, leather, salt, oil, vinegar, starch, iron, lead, yarn, glass, and many other commodities were in consequence only to be obtained at ruinous prices. The grievance was first mooted in parliament in 1571, by a Mr. Bell; but he was at once summoned before the council, and returned to the House "with such an amazed countenance, that it daunted all the rest" (*m*). After the lapse of twenty-six years the commons ventured, in 1597, to present an address to the queen on the same subject, to which she replied, through the lord keeper, that she "hoped her dutiful and loving subjects would not take away her prerogative, which is the choicest flower in her garden, and the principal and head pearl in her crown and diadem; but would rather leave that to her disposition, promising to examine all patents and to abide the touchstone of the law" (*n*). In spite of these fair words, the abuse, far from being abated, rose to a still greater height. So numerous were the articles subject to monopoly, that when the list of them was read over in the House in 1601, an indignant member exclaimed, "Is not bread amongst them? Nay, if no remedy is found for these, bread will be there before the next parliament" (*o*). A bill "for the explanation of the common law in certain cases of letters-patent" was introduced by Mr. Laurence Hyde, and was debated with unprecedented warmth for four days. The ministers and courtiers, who endeavoured

(*l*) Macaulay, Hist. Eng., i. [62-63].
(*m*) D'Ewes' Journal, 159.
(*n*) D'Ewes, p. 547.
(*o*) Parl. or Const. Hist., iv. 462.

to support the prerogative, were overborne by a torrent of indignant and menacing eloquence. The populace openly cursed the monopolies, and declared that the prerogative should not be suffered to touch the old liberties of England. Seeing that resistance was no longer politic, or even possible, Elizabeth, with admirable tact, sent a message to the House, that "understanding that divers patents which she had granted had been grievous to her subjects, some should be presently repealed, some superseded, and none put in execution but such as should first have a trial according to the law, for the good of the people." Robert Cecil, the secretary, added the more direct assurance that all existing patents should be revoked, and no others granted for the future. Overjoyed at their victory, the commons waited upon the queen with an address of thanks, to which she replied in an affectionate and even apologetic tone. "Never since I was a queen," she told them, "did I put my pen to any grant but upon pretext and semblance made to me that it was both good and beneficial to the subjects in general, though a private profit to some of my ancient servants who had deserved well. . . . Never thought was cherished in my heart that tended not to my people's good" (*p*).

Privileges of parliament vindicated.

The reviving independence of the House of Commons under the Tudor sovereigns, especially during the reign of Elizabeth, is further evidenced in the care with which the peculiar privileges and immunities of parliament were from time to time vindicated. The cases of Ferrers in 1543, and of Smalley in 1575 (relating to the freedom of members and their servants from arrest), and the cases of Nowell in 1553, and of the county of Norfolk in 1586 (as to the right of the House to determine contested elections), have been already considered in treating of the three principal privileges of the commons (*q*). But there was another species of privilege, relating to the internal discipline of the House -the power to punish offences against the established order committed by any of themselves--which, though apparently at all times an essential attribute of any assembly enjoying the right of free debate, first begins to attract attention during the Tudor period.

(*p*) Parl. Hist., iv. 480.

(*q*) *Supra*, pp. 308 *seq.*, 315, 316.

Storie's case, 1548.

The journal of the commons records, under the date January 21, 1547-8, that John Storie, one of the burgesses, was ordered to be committed to the custody of the serjeant of the House. On the next day but one, articles of accusation were read against him, and on the following day the commons, of their single authority, committed him to the Tower. The exact nature of his offence is not stated, but he is known to have been a zealous opponent of the reformation, and would appear to have made use of language disrespectful alike to the House and to the government of the protector Somerset. On March 20, Storie sent a letter from the Tower with a full submission; whereupon the commons made an order "that the king's privy council in the nether House shall humbly declare unto the Lord Protector's grace that the resolution of the House is, that Mr. Storie be enlarged and at liberty out of prison; and to require the king's Majesty to forgive him his offences in this case towards his Majesty and his council." Under Queen Mary, Storie again fell under the censure of the House for disrespect to the Speaker; and in the same reign Thomas Copley, member for Gatton, was committed by the House to the custody of their serjeant for disrespectful words uttered of her Majesty. With less regard for their privileges, they directed the Speaker to declare this offence to the queen, and solicit her mercy for the offender (*r*).

Copley's case, 1558.

Hall's case, 1581.

Expulsion of a member.

The next case is more important, constituting as it does the leading precedent, so far as records show, for the power of the House to expel a member. Arthur Hall, a burgess for Grantham, was charged with having, on account of certain proceedings of the last session of parliament wherein he was privately interested, caused to be published a book, "not only reproaching some particular good members of the House, but also very much slanderous and derogatory to its general authority, power and state, and prejudicial to the validity of its proceedings in making and establishing of laws." He had previously incurred the displeasure of the commons in 1572, when he was ordered to appear at the bar "to answer for sundry lewd speeches, used as

(*r*) Hallam, Const. Hist., i. 272.

well in the House as elsewhere." On another occasion he had been "charged with seven several articles, but, having humbly submitted himself to the House and confessed his folly, was released with a good exhortation from the Speaker." Regarded now as incorrigible, he was expelled the House, fined 500 marks, and sent to the Tower, where he remained until the dissolution of parliament (*s*).

Dr. Parry's case, 1585.

The right of expulsion was again exercised by the commons in 1585, against William Parry, D.C.L., a burgess for Queenborough, for denouncing as cruel and bloody the bill to inflict the penalty of death on jesuits and seminary priests; and so tenacious were they of their dignity, that in the following year they caused a poor currier named Bland, on account of contemptuous words uttered against the House, to be brought to their bar, whence he was discharged only on making submission and paying a fine of twenty shillings (*t*).

Bland's case 1585.

Bribery at elections punished.

It is in the reign of Elizabeth also that the earliest precedent occurs for the punishment of bribery at elections. In 1571, the House inflicted a fine upon the borough of Westbury for receiving a bribe of four pounds from Thomas Long, the member returned, who is described as "a very simple man and of small capacity to serve in that place." The mayor was also ordered to refund the bribe; but Long, the briber, does not appear to have been expelled or otherwise punished (*u*).

Long's case 1571.

Commons' right to originate money bills.

In 1593 an attempt was made by the lords to encroach upon the commons' privilege of originating money bills. A message was sent from the Upper House referring to the queen's want of a supply, and requesting that a committee of conference might be appointed. This was acceded to; but it soon appeared that there was a difference of opinion between the upper and lower Houses. Sir Robert Cecil was instructed to report from the committee that the lords would not consent to grant anything less than three subsidies, while the commons wished to give

(*s*) D'Ewes, 291; Hallam, Const. Hist., i. 273. In addition to the misconduct mentioned in the text, Hall was suspected of being privy to the fraud committed by his servant Smalley in 1575; see *supra*, p. 310.

(*t*) D'Ewes, 366; Hallam, Const. Hist., i. 274.

(*u*) Commons' Journals, p. 88.

only two. Hereupon Mr. Francis Bacon (afterwards the celebrated Chancellor) rose, and while disclaiming any wish to refuse a subsidy, "disliked that this House should join with the Upper House in granting it. For the custom and privilege of this House hath always been, first to make offer of the subsidies from hence, then to the Upper House; except it were that they present a bill unto this House, with desire of our assent thereto, and then to send it up again." The court party tried hard to bring about another conference with the lords, but their motion to that effect was lost on a division by 217 to 128 (*w*).

The Constitution, though frequently violated in practice, remained theoretically intact.

Notwithstanding the arbitrary practice of Elizabeth's government, and the submissive and adulatory strain in which she was always addressed by the commons, it is evident that the theory of the constitution, as a monarchy greatly limited by law, remained intact. The facts already cited might be regarded as sufficient proof of this assertion, but it is supported by still further evidence of much weight.

In the "Harborowe of True and Faithful Subjects," published in 1559 by Aylmer, afterwards Bishop of London, in answer to John Knox's celebrated treatise against female monarchy entitled "A blast of the trumpet against the monstrous regiment of women" (*x*), the author thus enumerates his reasons why, in England, "it was not so dangerous a matter to have a woman ruler as men take it to be": "First, it is not she that ruleth, but the laws, the executors whereof be her judges appointed by her, her justices, and such other officers. Secondly, she maketh no statutes or laws, but the honourable court of parliament: she breaketh none, but it must be she and they together, or else not. If on the other part the regiment were such as all hanged on the king's or queen's will, and not upon the laws written; if she might decree and make laws alone without her senate; if she judged offences according to her wisdom, and not by limitation of statutes and laws; if she might dispose alone of war and peace; if, to be short, she were a mere monarch, and not a mixed ruler,

(*w*) D'Ewes, 486; Hallam, Const. Hist., i. 276.

(*x*) Knox's "Blast" was written in the time of Queen Mary and directed against her, but it was of course equally applicable to her sister Elizabeth.

you might peradventure make me to fear the matter the more, and the less to defend the cause" (*y*).

Again, in 1566, Mr. Onslow, then solicitor-general and Speaker of the commons, addressing Queen Elizabeth at the conclusion of the session, said: "By our common law, although there be for the prince provided many princely prerogatives and royalties, yet it is not such as the prince can take money or other things, or do as he will at his own pleasure without order; but quietly to suffer his subjects to enjoy their own without wrongful oppression; wherein other princes by their liberty do take as pleaseth them" (*z*).

Harrison, in his "Description of England," published in 1577, says of the parliament: "This House hath the most high and *absolute* power of the realm; for thereby kings and mighty princes have from time to time been deposed from their thrones; laws either enacted or abrogated; offenders of all sorts punished; and corrupted religion either disannulled or reformed. To be short, whatsoever the people of Rome did in their *centuriatis* or *tribunitiis comitiis*, the same is and may be done by authority of our Parliament House, which is the head and body of all the realm, and the place wherein every particular person is intended to be present, if not by himself, yet by his advocate or attorney. For this cause also, anything there enacted is not to be misliked, but obeyed by all men without contradiction or grudge" (*a*).

That the same theory of the constitution prevailed in the later period of Elizabeth's reign is evidenced by the words of the judicious Hooker in his "Ecclesiastical Polity." "I cannot choose," he says, "but commend highly their wisdom, by whom the foundations of this commonwealth have been laid; wherein, though no manner, person or cause be unsubject unto the king's power, yet

(*y*) "Harborowe of True and Faithful Subjects," 1559, cited by Brodie, Hist. Brit. Emp.—Title in margin, "It is less danger to be governed in England by a woman than anywhere else." Aylmer afterwards presents a picture of the wretchedness of the French, and compares their condition, and that of other continental states, with the situation of England.

(*z*) D'Ewes, p. 115.

(*a*) Harrison's Description of England, cited by Brodie, Hist. Brit. Emp.

so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule. The axioms of our regal government are these: '*Lex facit regem*'—the king's grant of any favour made contrary to the law is void;—'*Rex nihil potest nisi quod jure potest.*' . . . what power the king hath he hath it by law: the bounds and limits of it are known, the entire community giveth general order by law how all things publicly are to be done; and the king as the head thereof, the highest in authority over all, causeth, according to the same law, every particular to be framed, and ordered thereby. The whole body politic maketh laws, which laws give power unto the king; and the king having bound himself to use according to law that power, it so falleth out that the execution of the one is accomplished by the other" (*b*).

Similar views of the constitution—vaguely and somewhat timidly expressed it is true—are found in the "Commonwealth of England" of Sir Thomas Smith, one of Elizabeth's secretaries of state (*c*).

On the other hand a novel theory—utterly unknown to the ancient English constitution—of an absolute and paramount power inherent in the very nature of the regal office, had already found not a few supporters among the lawyers and courtiers of Elizabeth's reign. It was only after long years of bitter conflict, after the decapitation of one monarch and the deposition of another, that this theory of government which the Stuart dynasty adopted, developed, and pushed to its extreme logical results, was at length finally vanquished by the ancient free principles of the constitution which it had attempted to supplant.

(*b*) Hooker, Ecclesiastical Polity, bk. viii. [c. ii. 13]. The first four books were published in 1594; the fifth in 1597; the remaining three not till forty-seven years after his death, which happened in the year 1600. The sixth book, though written by Hooker, did not belong to this work; the real sixth book appears therefore to have been lost. See Keble's edition.

(*c*) Smith's Commonwealth, bk. ii. c. 3. This work was not published till 1589, twelve years after the author's death.

POOR LAWS (*d*).

Act for relief of the poor, 1601.

The year 1601 is remarkable not only for the victory of the commons on the question of monopolies, but also for the passing of the great statute, 43 Eliz. c. 2, "An Act for the relief of the poor," which is the foundation of our modern poor law.

Earlier practice.

In pre-Norman times the state did not directly relieve poverty, but by enforcing by legal sanctions the payment of tithes to the church, it may be said to have indirectly provided for the relief of the poor. In their inception tithes were voluntary offerings of the people, made under the belief—carefully inculcated by the clergy—of the religious duty of every Christian to bestow on God's service a tenth part of his goods. "But it was not possible or desirable," observes Stubbs (*e*), "to enforce" this duty "by spiritual penalties: nor was the actual expenditure determined except by custom, or by the will of the bishop, who usually divided it between the church, the clergy, and the poor. . . . The recognition of the *legal* obligation of tithes dates from the eighth century, both on the continent and in England. In A.D. 779 Charles the Great ordained that every one should pay tithe, and that the proceeds should be disposed of by the bishop; and in A.D. 787 it was made imperative by the legatine councils held in England, *which being attended and confirmed by the kings and ealdormen had the authority of witenagemots.* From that time it was enforced by not unfrequent legislation . . . the cathedral church being . . . the normal recipient, and the bishop the distributor." By a law of Ethelred II. the tithes were directed to be applied, in accordance with the ancient usage, one-third to church fabrics, one-third to the clergy, and the remaining third to the poor. It was not until the council held in A.D. 1200 that the principle of the prior claim of the parochial clergy on tithes was summarily stated (*f*). In the Mirror of Justice (*g*), it is said to be the right of the poor to be "sustained by parsons,

Tithes.

Almsgiving.

(*d*) [The long note on pp. 382-386 of the previous edition has been transferred to this place on the ground of greater convenience.—ED.]

(*e*) Const. Hist., i. 248.

(*f*) *Ibid.*, i. 250.

(*g*) C. 1, s. 3.

rectors of the church, and the parishioners, so that none of them die for default of sustenance," but the duty was one of imperfect obligation, there being no compulsory method of enforcing it. The clergy, however, more especially the monastic bodies, who, as impropriators of parochial benefices, had managed to secure a large portion of tithes, by no means neglected this duty; but unfortunately "the blind eleemosynary spirit" which led them to practise and inculcate indiscriminate almsgiving had a direct tendency to foster "that vagabond mendicity which unceasing and very severe statutes were enacted to repress." By Edward III.'s Statute of Labourers (*h*), it was forbidden to give alms, under colour of charity, to the able-bodied poor; every man having no means of his own was to accept service under pain of imprisonment. By the 12 Richard II. begging was permitted, subject to regulations -certificates might be given to poor men and women authorising them to beg within specified local limits.

Begging regulated by 12 Richard II.

Hen. VIII.'s poor laws.

Under Henry VIII. the same policy with regard to the poor was maintained, but with a great increase of severity. By the 22 Hen. VIII. c. 12, all beggars and vagrants—as well aged and impotent as able-bodied—were ordered to repair to the place of their birth. Justices of the peace were authorised to give licences to "aged and impotent persons" to beg within certain prescribed districts, but licensed beggars transgressing their limits, and all unlicensed beggars, were to be twice whipped and set in the pillory, and, on repeating the offence, to lose their ears. By the 27 Hen. VIII. c. 25, all cities, counties, towns, and parishes were directed to maintain their aged and impotent poor by voluntary alms, and to set the able-bodied to work; but "valiant and sturdy beggars," refusing to work, were to be punished by whipping for the first offence, loss of an ear for the second, and hanging for the third. By the same Act indiscriminate almsgiving was forbidden on pain of forfeiting ten times the value of the gift; but an offertory was to be made in every parish church on Sundays, to which the clergy were to exhort the people to contribute.

(*h*) *Supra*, p. 280.

Suppression of the monasteries.

By the suppression of the monasteries the chief support of vagrant mendicity was withdrawn; and under Edward VI. and Elizabeth numerous statutes were passed enforcing with greater stringency and severity the provisions already in existence for the relief of the aged and impotent, and the punishment of the "valiant and sturdy" poor.

The Act of 1601, the basis of modern poor-laws.

At length in 1601, the Act of 43 Eliz. introduced regular local taxation for the relief of the poor. Every parish was to be responsible for the maintenance of its own poor out of a rate to be levied on the landed property of the parish by "overseers of the poor," consisting of the churchwardens, and from two to four substantial householders nominated yearly by two justices of the neighbourhood. The rate was to be applied by the overseers (1) in providing work for all able-bodied persons who had no means to maintain themselves, and (2) in relieving the lame, impotent, old, blind, and such other persons as were poor and not able to work, and who had no parents, grandparents, or children competent to maintain them.

Law of settlement.

The Act of 43 Eliz. involved two principles: (1) the relief of the impotent and aged, and the providing work for the able-bodied poor: (2) that this should be done *parochially*, each parish providing for its own poor. It had already been directed by certain earlier statutes that paupers unable or unwilling to work should be compellable to remain in the particular parishes where they were *settled* (*i.e.*, where they were born, or had resided for a certain period, varying from one to three years). But there was nothing to prevent able-bodied and industrious paupers from resorting to any parish that they pleased for employment; and the irregular and imperfect manner in which the Act of Elizabeth was for many years carried out in many parishes caused a migration of poor into those which were better regulated. To relieve the latter from this unfair burthen an Act was passed in 1662 (14 Car. II. c. 12) providing that within forty days after the coming of any person to settle in any parish, he might, on complaint of the churchwardens or overseers that his circumstances were such that he was likely to become a charge upon the parish, be *removed*, by the warrant of two

justices, back to the parish in which he was born, or had been last settled for at least forty days. Thus originated the law of *settlement*, which has been the subject of a vast amount of subsequent legislation and still retains a close connection with the relief of the poor.

Administration of poor relief.

The relief of the poor in all its various details continued for more than a century under the uncontrolled management of the overseers, who, in too many instances, proved quite unequal to the duty of effectively working the Act.

Act of 1723.

In 1723, by 9 Geo. I. c. 7, churchwardens and overseers of parishes were empowered, with the consent of the vestry, to purchase or hire houses, or to contract with any person, for the lodging and employment of the poor; three small parishes were permitted to unite in establishing a single workhouse; and it was declared that such persons as declined to submit to the lodging provided for them should not be entitled to any relief.

Gilbert's Act, 1782.

In 1782, Mr. Davies Gilbert's Act (22 Geo. III. c. 83) authorised parishes in which the adoption of the Act should be agreed upon by two-thirds in number and value of the owners and occupiers, to appoint *guardians* to act in place of overseers of the poor; and also to enter into voluntary unions with each other for the accommodation, employment, and maintenance of their paupers.

Select Vestry Act, 1819.

In 1819 the Act 59 Geo. III. c. 12 empowered the vestry of any parish to commit the management of its poor to a committee of substantial householders, termed a *select vestry*, to whose directions the overseers should be bound to conform.

Both the Gilbert Act and the Select Vestry Act being permissive only and not compulsory, the relief of the poor in the great majority of parishes continued to be administered by the overseers. Under their ignorant administration the wise and simple provisions of the law for the relief of the poor gradually assumed the proportions of a gigantic national evil. "The industrial population of the whole country," observes Sir Erskine May (*i*), "was being rapidly reduced to pauperism, while property was threatened with no distant ruin. The system which was working this mischief assumed to be founded upon

(*i*) Const. Hist., iii. 405.

benevolence; but no evil genius could have designed a scheme of greater malignity for the corruption of the human race. The fund intended for the relief of want and sickness—of age and impotence—was recklessly distributed to all who begged a share. Every one was taught to look to the parish, and not to his own honest industry, for support."

Poor Law Amendment Act, 1834.

At length, in 1834, on the recommendation of a Royal Commission appointed at the request of parliament in the preceding year, to enquire into the state and administration of the laws relating to the poor, was passed the important Poor Law Amendment Act, 4 & 5 Will. IV. c. 76. "The principle was that of the Act of Elizabeth, to confine relief to destitution; and its object to distinguish between want and imposture. This test was to be found in the workhouse. Hitherto pauperism had been generally relieved at home, the parish workhouse being the refuge for the aged, for orphans and others, whom it suited better than out-door relief. Now out-door relief was to be withdrawn altogether from the able-bodied, whose wants were to be tested by their willingness to enter the workhouse. This experiment had already been successfully tried in a few well-ordered parishes, and was now generally adopted. But instead of continuing ill-regulated parish workhouses, several parishes were united, and union workhouses established common to them all. The local administration of the poor was placed under elected boards of guardians; and its general superintendence under a central Board of Commissioners in London" (*k*). The Poor Law Commissioners were appointed for five years, but the duration of the Commission was afterwards extended from time to time till 1847, when, by statute 10 & 11 Vict. c. 109, it was superseded by a new Commission, afterwards known as the Poor Law Board, consisting of the lord president of the council, lord privy seal, home secretary, and chancellor of the exchequer for the time being, and of such other persons as the crown might appoint. In 1871, by statute 34 & 35 Vict. c. 70, the Poor Law Board was abolished and its powers transferred to a new body called the Local Govern-

The workhouse test.

Poor Law Board, 1847.

(*k*) May, Const. Hist., iii. 407.

Local Government Board, 1871.

ment Board (in which was concentrated the supervision of the laws relating to the public health, the relief of the poor, and local government), consisting of a president appointed by and holding office during the pleasure of the crown, of the president of the council, all the principal secretaries of state, the lord privy seal, and the chancellor of the exchequer.

Within three years from the passing of the Act of 1834 its beneficial effects were manifested in a reduction, to the extent of three millions, in the annual expenditure for the relief of the poor. Some of the provisions of the Act have since been partially relaxed; and the strict and universal application of the workhouse test can hardly be hoped for until supplemented by an efficient organisation of private charity, working in independent but harmonious correlation with the public system, for the relief of industrious and deserving persons in temporary difficulties, who, by timely aid, may be kept from falling into the ranks of paupers. [Since the passing of this Act more than a hundred statutes have greatly increased the duties and responsibilities of the Local Government Board—among them the Public Health Act, 1875, the Local Government Acts of 1888 and 1894 (*l*); the Public Health Acts Amendment Act, 1890, and the Agricultural Rates Act, 1896 (*m*).

"By the Poor Law Conferences Act, 1883 (46 & 47 Vict. c. 11), parish unions were permitted to recoup themselves from the Poor Law funds for expenses incurred in sending officers to conferences, and for the publication of the results of such conferences" (*n*).

Unemployment.

Labour Exchanges.

[In 1905 a Royal Commission was appointed to inquire into (1) the poor law administration and (2) the relief of distress, caused by poverty and unemployment. As a result, the liberal government in office passed the Unemployed Workmen Act (1906), which systematised relief works, and the Labour Exchanges Act (1909), which enables the Board of Trade to furnish information as to employers desiring workpeople, and *vice versa*. Neither of

(*l*) *Infra*, chap. xviii., *in init.*
(*m*) See Blake Odgers, Loc. Gov. (2nd ed.), p. 250.
(*n*) P. F. Aschrott, Das Engl. Armen-Wesen (Leipzig, 1886).

these Acts has achieved what was expected. Meanwhile, in the same direction, have come the Old Age Pensions Acts, 1908 (8 Edw. VII. c. 40), and 1911 (1 & 2 Geo. 5. c. 16), which were followed by a gigantic system of national insurance (health and unemployment), established by the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), and 3 & 4 Geo. 5, c. 37.

Old Age Pensions.

CHAPTER XIII.

THE STUART PERIOD.

I. FROM THE ACCESSION OF JAMES I. TO THE PETITION OF RIGHT.

(1603—1628.)

JAMES I. 1603-1625.

Tendency of political and religious thought.

JAMES I. came to the English throne at a critical period of our history. The reactionary movement towards despotism, which began under Henry IV., reached its climax under Henry VIII., and had since been slowly receding before the reviving spirit of freedom. During the latter years of Elizabeth the puritan party had become organised and powerful. Whilst the old queen lived, they were, for the most part, content to postpone the active assertion of the rights of the people against the crown.

The puritan party.

They looked forward with hope to the advent of her successor, in the expectation of voluntary concessions; but were determined in any case to carry out further reforms in the ecclesiastical system, and to insist upon all the ancient privileges of parliament, and all the legal liberties of the subject. Violent changes were not, however, generally desired. Although there was a party hostile to the hierarchy, the bulk of the puritans had no desire to abolish episcopacy (*a*), and would have been fully satisfied with a dispensation from certain ceremonies which too forcibly reminded them of the religion they had re-

(*a*) ["From the year 1595 the dissenting body had become known under the party name of sabbatarians, and under James I. the sects had attained considerable proportions. Still, however, a consciousness of a fundamental schism in the political system as a whole did not exist."—Gneist. Hist. Engl. Const., p. 548, note (1). "The first warning which the monarchy received of the coming Revolution was given towards the close of the reign of Elizabeth, when the puritan element, strongest among the mercantile classes in the towns, and among the small country proprietors, began to return a majority to the House of Commons."—Taylor. Engl. Const., p. 598. —ED.]

nounced. The presbyterian education of James had led them to anticipate a ready acquiescence in such a moderate measure of reform. But the king's experience of the presbyterian clergy had, in fact, been productive of prejudices the very opposite to what the English puritans had expected. "The Scotch clergy," observes Mr. Brodie, "full of the highest ambition, had converted the pulpit into a theatre for political declamation: and James had imbibed the bitterest hostility to everything which approached to the presbyterian form of ecclesiastical establishment, declaring that under it Jack and Tom and Dick and Will presumed to instruct him in affairs of state" (*b*). Under the tuition of the celebrated George Buchanan, James had acquired more learning than he had understanding to digest. Puffed up with literary pride and self-sufficiency, he imagined himself possessed of supereminent wisdom, while in reality lacking the judgment of a man of ordinary abilities. The Duc de Sully called him the "wisest fool in Europe" -a phrase which epigrammatically sums up the peculiarities of the king's intellect (*c*).

James's presbyterian education

The avowed antipathy of James to every kind of protestant nonconformity was based on political rather than on religious reasoning. "The presbytery," he said, "agreeth as well with monarchy as God with the devil." He was convinced that the hierarchy was the firmest support of the crown, and that where there was no bishop there would soon be no king. He determined, therefore, to allow not the slightest toleration to nonconformists, a resolution in which he was confirmed by the fulsome flattery of the prelates, some of whom, at the Hampton Court conference, did not hesitate to ascribe to him immediate inspiration from heaven.

His antipathy to nonconformity.

On his journey to London the puritan clergy presented to the king what is commonly called the "Millenary

The "Millenary Petition."

(*b*) Brodie, Hist. Brit. Emp., i. 332.

(*c*) ["In the princes of the house of Stuart we see little of the sober Gothic honesty of the lowland Scot, much of the vanity, unsteadiness, and insincerity natural to the Italian Gallic stock from which they came." Gneist, Const. Hist., p. 546, citing Vaughan, iii. 13.—Ed.]

Petition," because it purported to proceed from "more than 1,000 ministers," though the actual number of those who signified their assent to it is said not to have exceeded 825. It contained nothing inconsistent with the established hierarchy; but the petitioners prayed for "a reformation in the church service, ministry, livings, and discipline." In order to obtain further information on the points in dispute, James summoned the famous conference at Hampton Court between the Archbishop of Canterbury, eight bishops, five deans and two doctors on the one side, and Dr. Reynolds and three other puritan divines on the other. At the conference, which was held before the king on January 14, 15, and 16, 1603-1604, instead of acting as moderator, James, eager to display his theological learning, assumed the part of advocate for the church. Transported with admiration, the primate exclaimed that "his majesty spoke by the special assistance of God's spirit"; and the Bishop of London said "his heart melted within him to hear a king, the like of whom had not been since the time of Christ" (*d*). Some slight alterations in the Book of Common Prayer were made after the conference; but ten of the men who had presented the Millenary Petition were committed to prison, "the judges having declared in the Star Chamber that it was an offence fineable at discretion, and very near to treason and felony, as it tended to sedition and rebellion" (*e*).

While sternly repressing the nonconforming protestants, James at the same time showed an inclination to grant some partial indulgence to the Roman catholics—a policy which excited disgust and jealousy throughout the kingdom, and thus strengthened the hands of the puritan faction. James soon found it necessary, in order to free himself from the imputation of papistry, with which the puritans assailed him, to cause the penal laws against the catholics to be put into execution. After the discovery of the Gunpowder Plot, additional severity was added to the statutes in force by two Acts "containing more than seventy articles inflicting penalties on the catholics in all

(*d*) Howell's State Trials, ii. 86, 87.

(*e*) Hallam, Const. Hist., i. 298. [The above paragraph formed a footnote in the preceding edition.—Ed.]

their several capacities of masters, servants, husbands, parents, children, heirs, executors, patrons, barristers, and physicians" (*f*).

Arbitrary nature of his civil government.

The civil government of James was no less impolitic and arbitrary than his ecclesiastical. At a time when the growing spirit of freedom, the general diffusion of knowledge, and the revived study of Greek and Roman authors (*g*) had caused a republican tendency to manifest itself in parliament, and among the people, this alien king—who, having been legally excluded from the English throne by the testament of Henry VIII., had no title to it but such as he derived from the will of the English people—was constantly asserting, in the most offensive form, the novel and monstrous theory of his divine right to absolute and irresponsible sovereignty. The doctrine had already been advanced by him some years before in Scotland, in a treatise on the "True Law of Free Monarchies" (*h*).

Theory of divine right

In 1604, Convocation drew up a set of canons, 141 in number, which received the royal assent, but never having been sanctioned by parliament are not legally binding upon the laity. Besides declaring every man to be excommunicated who should question the complete accordance of the prayer book with the Word of God, they denounce as erroneous a number of tenets believed to be hostile to royal government, and inculcate the duty of passive obedience to the king, in all cases without exception (*hh*).

Adopted by the hierarchy and the courtiers, the theory of divine right was later on elaborated into a system by Sir Robert Filmer (*i*), and became the distinctive badge of the more violent high-churchmen and tories. "It was

(*f*) 3 James I. c. 4, "For the better discovering and repressing of Popish recusants"; and 3 James I. c. 5, "To prevent and avoid dangers which grow by Popish recusants." See also 7 James I. c. 2, and c. 6. [Most of the above paragraph was in a footnote in the preceding edition.—Ed.]

(*g*) On the powerful influence of the classical writings in the direction of liberty, see Lecky, Rationalism in Europe, ii. 218. *Cf.* Hobbes, Leviathan, c. xxix.

[On the Italian Renaissance as the "mother of modern political science," *vide* Taylor, Engl. Const., pp. 595, 596.—Ed.]

(*h*) King James's Works, p. 207.

(*hh*) [This paragraph was a footnote in the preceding edition.—Ed.]

(*i*) In his famous "Patricia," written in the reign of Charles I., but not published till after the restoration of Charles II.

gravely maintained that the Supreme Being regarded hereditary monarchy, as opposed to other forms of government, with peculiar favour; that the rule of succession in order of primogeniture was a divine institution, anterior to the Christian, and even to the Mosaic dispensation; that no human power, not even that of the whole legislature, no length of adverse possession, though it extended to ten centuries, could deprive a legitimate prince of his rights: that the authority of such a prince was necessarily always despotic; that the laws, by which, in England and in other countries, the prerogative was limited, were to be regarded merely as concessions which the sovereign had freely made and might at his pleasure resume; and that any treaty which a king might conclude with his people was merely a declaration of his present intentions, and not a contract of which the performance could be demanded" (*k*).

Conflict with the House of Commons.

Such being the ideas of the king on regal government, it was inevitable that he should speedily come into conflict with the House of Commons, a body fully aware of its ancient rights and privileges, impressed with the duty of asserting and maintaining them, and strong in the consciousness that it represented the feelings and wishes of the great majority of all classes of the nation (*l*).

James is the aggressor.

The very first acts of James's reign were ominous of the arbitrary manner in which he designed to rule his new kingdom. On his journey to London he ordered a thief,

(*k*) Macaulay, Hist. Eng., i. 71. The sublime pretensions of James were rendered ludicrous, as well as irritating, by the contemptible demeanour of the king himself. *Cf.* Green, Short Hist. of Eng. People, pp. 464, 467.

(*l*) Towards the end of the 16th, and during the earlier part of the 17th, century, the House of Commons included among its members a large body of men of ability, recruited especially from amongst the lawyers, who became known to the electors by the talent which they displayed at the bar. "The services which this class of men rendered to the cause of freedom were incalculable. The learning of the ablest lawyers in the 16th century may have been small in comparison with the stores of knowledge which may be acquired in our own day; but, relatively to the general level of education, it stood far higher. A few years later a race of parliamentary statesmen would begin to arise from amongst the country gentlemen; but, as yet, almost all pretensions to statesmanship were confined to the council table, and its supporters. For the present, the burthen of the conflict in the commons lay upon the lawyers, who at once gave to the struggle against the crown that strong legal character which it never afterwards lost."—S. R. Gardiner, Hist. Eng. from 1603 to 1616, i. 178.

taken in the fact, to be executed without the formality of a trial (*m*); and in the proclamation summoning his first parliament he was guilty of a daring infringement upon the privileges and independence of the House of Commons. He took upon himself to specify the kind of men who were to be elected, and directed that all returns should be sent to his Court of Chancery, and that such as should be there found contrary to the proclamation should be rejected as "unlawful and insufficient" (*n*).

James's first parliament met on March 19, 1603-4. It was felt that a struggle with the crown was at hand. So large was the attendance of members in their places that additional seats had to be provided. In answer to the address from the throne, the Speaker, Sir Edward Phelips, was careful to remind the king of the limited nature of his regal powers: "New laws," said he, "could not be instituted, nor imperfect laws reformed nor inconvenient laws abrogated, by any other power than that of the High Court of Parliament, that is, by the agreement of the commons, the accord of the lords, and the assent of the sovereign; that to the king belonged the right either negatively to frustrate, or affirmatively to ratify; but that he could not institute: every bill must pass the two Houses before it could be submitted to his pleasure."

Privileges of the commons vindicated.

The first business of the commons was the vindication of their exclusive right to determine contested elections, against the attempt of James to transfer the decision of such cases to his Court of Chancery. Another of their privileges, freedom from arrest, was also energetically asserted, and received for the first time a distinct legislative recognition (*o*).

(*m*) "I hear our new king," said Sir John Harrington, "has hanged one man before he was tried; it is strangely done. Now, if the wind bloweth thus, why may not a man be tried before he has offended?"—Nugæ Antiquæ, i. 180.

(*n*) Parl. Hist., i. 967. Gardiner, Hist. Eng., 1603-1642, i. 163, shows from the Egerton Papers, 384, that of the "two sets of notes for the proclamation," it is that in Lord Chancellor Ellesmere's hand which "alone contains the direction for the reference of disputed elections to chancery, showing that this assumption originated with him."

(*o*) See the cases of Sir Thomas Shirley, and of Goodwin and Fortescue, *supra*, pp. 310, 316. During the discussion on Goodwin's case, James in-

Complaints of grievances.

During a long and stormy session the commons freely discussed their various grievances: the ancient abuse of purveyance, which, notwithstanding thirty-six restraining statutes, still flourished with scarcely diminished vigour; the hardships of feudal guardianship in chivalry; the monopolies of the great foreign trading companies, and several other matters of complaint. After granting the usual duties of tonnage and poundage for the king's life, they concluded by placing on record a remarkable protestation of their rights and liberties, drawn up by a committee of the House, and entitled "A form of apology and satisfaction to be delivered to his Majesty." In this important constitutional document the commons commence by expressing a desire to justify their own conduct and to remove from the king's mind certain misinformations under which he appeared to be labouring; namely: First, that the privileges of the commons were not held of right, but of grace only, renewed every parliament by way of donative, upon petition; secondly, that they are no court of record, nor yet a court that can command view of records, but that the attendance with the records is courtesy not duty; and lastly, that the examination of the returns of writs for knights and burgesses is without their compass and belonging to the chancery: assertions against which, as "tending directly and apparently to the utter overthrow of the very fundamental privileges of our House, and therein of the rights and liberties of the whole commons of the realm of England which they and their ancestors from time immemorial have undoubtedly enjoyed," they protest, "in the name of the whole commons of England, with uniform consent, for themselves and their posterity." In contradiction to these misinformations the commons avouched: (1) "That our privileges and liberties are of right and due inheritance no less than our very lands and goods; (2) That they cannot be withheld from us, denied, or impaired, but with apparent wrong to the whole state of the realm; (3) That our making of

Assertions of privileges by commons.

formed the commons that "he had no purpose to impeach their privilege, *but since they derived all matters of privilege from him, and by his grant,* he expected that they should not be turned against him."

request, in the entrance of parliament, to enjoy our privileges, is an act of manners only, and doth not weaken our right, no more than our sueing to the king for our lands by petition, which form, though new and more decent than the old *praecipe*, yet the subject's right is no less now than of old; (4) That our House is a court of record and so ever esteemed; (5) That there is not the highest standing in this land that ought to enter into competency, either for dignity or authority, with this High Court of Parliament, which, with your Majesty's royal assent, gives laws to other courts, but from other courts receives neither laws nor orders; (6) And lastly, that the House of Commons is the sole proper judge of the return of all such writs and of the election of all such members as belong unto it, without the which the freedom of election were not entire; and that though your Majesty's Court of Chancery send out these writs and receive the returns and preserve them, yet the same is done only for the use of Parliament, over which neither the Chancery nor any other court, ever had, or ought to have, any manner of jurisdiction." Further on they inform the king that in regard to the late queen's "sex and age which we had great cause to tender, and much more upon care to avoid all trouble, which by wicked practice might have been drawn to impeach the quiet of your Majesty's right in the succession [a gentle hint at the legal and other difficulties which had stood in the way of James's claim to the throne], actions were then passed over which we hoped in succeeding times to redress and rectify: whereas, contrarywise in this parliament, not only privileges, but the whole freedom of the parliament and realm, hath from time to time, on all occasions, been mainly hewed at." They then enter into particulars of the various matters which had arisen during the session — the business of Goodwin's election, of Sir Thomas Shirley's arrest, and other causes of complaint. "For matter of religion," they assure his Majesty that he would be misinformed "if any man should deliver that the kings of England have any absolute power in themselves, either to alter religion (which God forfend should be in the power of any mortal man whatsoever), or to make

any laws concerning the same, otherwise than, as in temporal causes, by consent of parliament." Touching their own desires and proceedings therein, there had been not a little misconception and misinterpretation. "We have not come," they said, "in any puritan or Brownist (*p*) spirit to introduce their parity, or to work the subversion of the state ecclesiastical as it now stands, things so far and so clear from our meaning as that, with uniform consent, in the beginning of this parliament we committed to the Tower a man who out of that humour had, in a petition exhibited to our House, slandered the bishops; but according to the tenor of your Majesty's writs of summons directed to the counties from which we came, and according to the ancient and long-continued use of parliaments, as by many records from time to time appeareth, we came with another spirit, even with the spirit of peace; we disputed not of matters of faith and doctrine, our desire was peace only, and our device of unity, how this lamentable and long-lasting dissension amongst the ministers (from which both atheism, sects, and ill-life have received such encouragement and so dangerous increase) might at length, before help come too late, be extinguished. And for the ways of this peace we are not addicted at all to our own inventions, but ready to embrace any fit way that may be offered. Neither desire we so much that any man, in regard of weakness of conscience, may be exempted after parliament from obedience to laws established, as that in this parliament such laws may be enacted as by relinquishment of some few ceremonies of small importance, or by any way better, a perpetual uniformity may be enjoined and observed." They conclude by assuring the king that "Our care is, and must be, to confirm the love, and to tie the hearts of your subjects, the commons, most firmly to your Majesty. . . . Let no suspicion have access to their fearful thoughts that their privileges, which they think by your Majesty should be protected, should now by

(*p*) The "Brownists" took their name from Robert Browne, a kinsman of Lord Burleigh, and at one time chaplain to the Duke of Norfolk. His principles were ["no doubt," says Blunt, Dict. Sects., &c.] those afterwards held by the Independents.

sinister information or counsel be violated or impaired, or that those who with dutiful respect to your Majesty speak freely for the right and good of their country shall be oppressed or disgraced. Let your Majesty be pleased to receive public information from your commons in parliament, as well of the abuses in the church as in the civil state and government. For private informations pass often by practice. The voice of the people, in things of their knowledge, is said to be as the voice of God. And if your Majesty shall vouchsafe, at your best pleasure and leisure, to enter into gracious consideration of our petitions for ease of those burthens under which your whole people have long time mourned, hoping for relief by your Majesty, then may you be assured to be possessed of their hearts for ever, and if of their hearts then all they can do and have" (*q*).

In this free and outspoken yet thoroughly conservative and monarchical address, the commons of England, at the commencement of their conflict for liberty with the House of Stuart, took up the position which they resolutely maintained during the eighty-four long and stormy years. "To understand this Apology," remarks S. R. Gardiner, "is to understand the causes of the success of the English Revolution. They did not ask for anything which was not in accordance with justice. They did not demand a single privilege which was not necessary for the good of the nation as well as for their own dignity. In every point they were emphatically in the right, while in some point or other, the king, the council, the House of Lords, the bishops, and the puritans, were no less emphatically in the wrong. Their cause was just, and with the knowledge that the nation would support them, they could afford to wait with patience" (*r*).

Bill not to be proposed twice in same session.

During the next two sessions of parliament (January 21, 1605-6, to May 27; and November 18, 1606, to July 4, 1607) constant bickerings occurred between the king and the commons, but unmarked by any very decisive assertion of prerogative on the one hand or of privilege on the other.

(*q*) Parl. Hist., i. 1030; and State Papers, Dom. viii. 70.
(*r*) S. R. Gardiner, Hist. Eng. (1603-1616), i. 208.

In the session of 1606, the rule that the same bill cannot be proposed twice in the same session was established, probably for the first time, by the action of the lords, who peremptorily rejected a bill respecting purveyance which the commons sent up to them very shortly after they had thrown out a previous bill to the same effect.

Jurisdiction over their own members.

In the session of 1607 the commons, at the king's request, expelled and imprisoned one of their members, Sir Christopher Pigott (who had been chosen for Buckinghamshire on the resignation of Sir Francis Goodwin), for slanderous aspersions cast upon the national character of the Scots. But this was rather a confirmation of their jurisdiction over their own members than any surrender of their privileges. Three days after the speech had been uttered, the king sent them a message "how much he did mislike and tax the neglect of the House, in that the speech was not interrupted in the instant and the party committed before it became public, and to his Highness' ear." They hesitated for some time; "they knew not," they said, "what way to censure him for it; freedom of speech in their House was a darling privilege." But it was evident that the king had just cause to complain, and, after resolving that Pigott, being a member of the House, was not liable to be called in question elsewhere, they determined, in the exercise of their own discretion, to punish the intemperance of their own member (*rr*).

Union between England and Scotland.

During both sessions the principal subject of discussion was James's favourite, but premature, scheme for a perfect union between England and Scotland, so that all his subjects might enjoy the same rights and be amenable to the same laws. But the proposition was repugnant to both English and Scots, in whom the national prejudices and animosities of ages still warmly glowed, and the only result was the passing of an Act (4 Jac. I. c. 1) by which all hostile laws between the two kingdoms, extending from the 7th Richard II. (1383) to the reign of Elizabeth, were repealed.

The king was anxious to have a declaratory Act pronouncing that the union of the crowns had effected a

(*rr*) Com. Journ., i. 335.

mutual naturalisation of the *post-nati* (*i.e.*, persons born after his accession to the throne of England), and also an enabling Act conferring the same right upon the *ante-nati*. The English House of Commons was averse to this proposal, and the king, knowing that the opinions of the judges were favourable to the *post-nati*, determined to get the point settled out of parliament by an English court of law. A piece of ground was accordingly bought in the name of Robert Calvin, an infant, born in Edinburgh in 1605, and an action was then brought in his name against two persons who, by collusion, were supposed to have deprived him of his land. This raised the question as to whether Calvin was an alien, as, in that case, he would be disabled from holding land in England. It was held by twelve judges out of fourteen, in the Exchequer Chamber, that the Scottish *post-natus* was a natural-born subject of the King of England (*s*).

Calvin's case, 1608.

[It may be added, to remind us of a fundamental principle of our constitutional law, that it was repeatedly laid down in this case that allegiance to the sovereign and protection by the sovereign are reciprocal.]

Allegiance and protection.

Offended at the commons' bold assertion of their privileges and constant complaints of grievances, James allowed an interval of two years and a half to elapse without meeting his parliament. In want of money, but unwilling to apply for a legislative grant, he had recourse to the unconstitutional expedient of increasing the duty on imports by his own sole authority. In 1606 the king had directed the collectors of customs to demand a duty of 5s. per cwt. on all currants imported, in addition to the 2s. 6d. granted by the statute of tonnage and poundage. John Bates, a merchant of the Levant Company, refused to pay the additional impost, alleging that it was illegal without the authority of parliament. An information was exhibited against him in the Court of Exchequer, and a unanimous decision of the four barons was soon given for the crown. But the language of Chief Baron Fleming and Baron Clark (the only two whose judgments are reported) was even more

Parliament not summoned from July 4, 1607, to Feb. 9, 1609-10

Illegal impositions on merchandise.

Bates's case, (the "*Case of Impositions*") 1606.

(*s*) *Calvin's case* [(1608), 7 Co. Rep. 1]; 2 St. Tr. 559. [See also Broom. Const. Law, pp. 4-26.] [This paragraph was in a footnote in the preceding edition.]

subversive of liberty than the actual decision itself. They maintained that "the king's power is twofold, ordinary and absolute. His ordinary power is for the profit of particular subjects, for the execution of civil justice in the ordinary courts, and is called by civilians *jus privatum*, with us common law: it cannot be changed without parliament. The king's absolute power, on the contrary, is applied not for the benefit of particular persons, but for the general benefit of the people, and is *salus populi*. This power is not directed by the rules of common law, but is properly termed policy or government, varying according to the wisdom of the king for the common good. The matter in question is material matter of state, and ought to be governed according to the rules of policy by the king's extraordinary power. All customs (= duties), be they old or new, are the effects of foreign commerce: but commerce and all affairs with foreigners, war and peace, and all treaties whatsoever, are made by the absolute power of the king; he therefore who has power over the cause, has power also over the effect. No exportation or importation can be but at the king's ports. But the seaports are the king's gates which he may open or shut to whom he pleases." As to the statutes alleged on the part of the defendant, limiting the king's prerogative to impose duties, Baron Clark maintained the monstrous proposition that Edward III. in giving his assent to the Act of the 43rd of his reign, c. 4 (forbidding any new impositions to be laid on wool or leather), "did not bind his successors" (*t*).

Even while the case was pending the merchants hastened to appeal to the House of Commons; and in the Petition of Grievances presented by the House at the end of the session of 1606 a request was included that the impositions might cease to be levied, as no such duty could legally be demanded without the consent of parliament. When the commons reassembled in November, James informed them of the legal decision in his favour, and for a time the matter was allowed to drop. But the king soon determined to make a more extensive use of this power of taxation which the judges had declared to be vested in the crown.

(*t*) Judgment (abridged) in *Bates's case* (the "Case of Impositions"), 2 St. Tr. 371; [Broom, Const. Law, pp. 247-305].

On July 29, 1608, a Book of Rates was published under the authority of the Great Seal, imposing heavy duties upon almost all mercantile commodities, "to be for ever hereafter paid to the king and his successors, on pain of his displeasure." The Book of Rates. 1608.

At length the financial difficulties of the king compelled him again to summon parliament (*u*). The lawyers in the Lower House had in the meantime been looking into the legal authorities, and were now prepared to dispute the decision of the judges in the Case of Impositions. Notwithstanding a message from the king forbidding them to discuss the question, the commons were not to be deterred. During a four days' debate the illegality of impositions was conclusively shown from statutes and precedents, in the elaborate and luminous arguments of Hakewill, Yelverton, and Whitelocke. The House was almost unanimous against the crown. They presented a strong remonstrance to the king on his attempt to prevent discussion, claiming "as an ancient, general, and undoubted right of parliament, to debate freely all matters which do properly concern the subject: which freedom of debate being once foreclosed, the essence of the liberty of parliament is withal dissolved." With regard to the impositions and judgment in the Exchequer, "the reasons whereof extended much farther, even to the utter ruin of the ancient liberty of this kingdom, and of the subjects' right of property in their lands and goods," they remind the king that "the policy and constitution of this your kingdom appropriates unto the kings of this realm, with the assent of the parliament, as well the sovereign power of making laws as that of taxing or imposing upon the subjects' goods or merchandises wherein they have justly such a property as may not, without their consent, be altered or changed": that whenever former kings, "occasioned either by their wars, or their Remonstrance against impositions.

(*u*) Special precautions were taken to obtain a majority favourable to the crown. "During the long interval which had passed since the last session several vacancies had occurred. To four, at least, of the constituencies which had seats at their disposal [the treasurer] Salisbury made applications in favour of nominees of his own. The answers which he received throw some light upon the manner in which elections were at that time conducted."—Gardiner, Hist. Eng. (1603-1616), i. 449; and see State Papers, Dom. [1603-1610, pp. 550, 551, 556], xlviii. 109, 116; xlix. 10.

over-great bounty, have without consent of parliament set impositions either within the land or upon commodities exported or imported by the merchants," the commons "have in open parliament complained of it, in that it was done without their consents, and thereupon never failed to obtain a speedy and full redress without any claim made by the kings of any powers or prerogative in that point": that "these famous kings for the better contentment and assurance of their loving subjects agreed that this old fundamental right should be further declared and established by Act of Parliament, wherein it is provided that no such charges should ever be laid upon the people, without their common consent, as may appear by sundry records of former times." They proceed: "We, therefore, your Majesty's most humble commons assembled in parliament, following the example of this worthy care of our ancestors, and out of a duty to those for whom we serve, finding that your Majesty, without advice or consent of parliament, hath lately, in time of peace, set both greater impositions, and far more in number than any your noble ancestors did in time of war, have with all humility presumed to present this most just and necessary petition unto your Majesty: That all impositions set without the assent of parliament may be abolished and taken away: and that your Majesty, in imitation likewise of your noble progenitors, will be pleased that a law may be made during this session of parliament to declare that all impositions set, or to be set, upon your people, their goods and merchandises, save only by common assent in the parliament, are and shall be void" (*w*). A bill was introduced and passed through the commons enacting that no imposition, other than those already in existence, should thereafter be laid without consent of parliament, but it was thrown out by the lords. The judgment in *Bates's case* continued therefore to afford the shelter of a legal decision for the arbitrary exactions of the crown.

Complaints against the High Commission Court, and royal proclamations.

Besides the question of impositions, the commons brought forward a number of other grievances. They specially complained of the High Commission Court: of the abuse of

(*w*) Petyt. Jus. Parl., 322, 323.

proclamations, "by reason whereof," they said, "there is a general fear conceived and spread amongst your Majesty's people, that proclamations will by degrees grow up and increase to the strength and nature of laws; whereby not only that ancient happiness—freedom will be much blemished (if not quite taken away), which their ancestors have so long enjoyed: but the same may also, in process of time, bring a new form of arbitrary government upon the realm, and this their fear is the more increased by occasion of certain books lately published, which ascribe a greater power to proclamations than heretofore had been conceived to belong unto them." Dr. Cowell, reader in civil law at the University of Cambridge, had recently published, under the patronage of Archbishop Bancroft, a law dictionary called "The Interpreter," containing most extravagant assertions in support of the king's absolute power. Under the title "King" was written: "He is above the law by his absolute power: and though for the better and equal course in making laws he do admit the three estates unto council, yet this in divers learned men's opinion is not of constraint, but of his own benignity or by reason of the promise made upon oath at the time of his coronation. And though at his coronation he take an oath not to alter the laws of the land, yet, this oath notwithstanding, he may alter or suspend any particular law that seemeth hurtful to the public estate. Thus much in short, because I have heard some to be of opinion that the laws are above the king." Of the parliament it is asserted: "Of these two, one must needs be true, that either the king is above the parliament, that is, the positive laws of this kingdom, or else that he is not an absolute king. . . . And, therefore, though it be a merciful policy, and also a politic mercy (not alterable without great peril) to make laws by the consent of the whole realm, because so no one part shall have cause to complain of a partiality, yet simply to bind a prince to or by those laws were repugnant to the nature and constitution of an absolute monarchy." Farther on he "holds it incontrollable that the king of England is an absolute king," and "that subsidies were granted by parliament in consideration of the king's goodness in waiving his absolute power to make laws without

Cowell's "Interpreter."

their consent" (*x*). The commons were so incensed at these opinions, more especially as the king was reported to have spoken in praise of the book, that they requested a conference on the subject with the lords. But before any further steps had been taken, James thought it expedient to express his displeasure at the imprudent language of this too zealous advocate of prerogative, and a proclamation was shortly afterwards issued prohibiting the purchase, uttering or reading of the book, and calling in all copies issued (*y*).

(*x*) Cowell's "Interpreter," ed. 1607, articles "King," "Parliament," "Prerogative," "Subsidy."

(*y*) Lord Salisbury reported to the House of Lords that the king had acknowledged that, although he derived his title from his ancestors, "yet the law did set the crown upon his head," "and that he was a king by the common law of the land." He "had no power to make laws of himself, or to exact any subsidies *de jure*, without the consent of his three estates, and, therefore, he was so far from approving the opinion, that he did hate those that believed it."—Parl. Deb. in 1610 (Camden Society), p. 24, cited by Gardiner, Hist. Eng. (1603-1616). In the proclamation suppressing the "Interpreter," James took care to improve the occasion, by himself exalting the regal dignity to a level with the Deity: "This later age and times of the world wherein we are fallen," it begins, "is so much given to verbal profession, as well of religion as of all commendable moral virtues, but wanting the actions and deeds agreeable to so specious a profession, as it hath bred such an unsatiable curiosity in many men's spirits, and such an itching in the tongues and pens of most men, as nothing is left unsearched to the bottom both in talking and writing. For from the very highest mysteries in the Godhead and the most inscrutable counsels in the Trinity, to the very lowest pit of Hell, and the confused actions of the devils there, there is nothing now unsearched into by the curiosity of men's brains. Men not being contented with the knowledge of so much of the will of God as it hath pleased him to reveal, but they will needs sit with him in his most private closet and become privy of his most inscrutable counsels; and therefore it is no wonder that men in these our days do not spare to wade in all the deepest mysteries that belong to the persons or state of *kings and princes, that are Gods upon earth*: since we see (as we have already said) that they spare not God himself. And this licence that every talker or writer now assumeth to himself is come to this abuse, that many Phormios will give counsel to Hannibal, and many men that never went of the compass of cloysters or colleges will freely wade by their writings in the deepest mysteries of monarchy and politick government: whereupon it cannot otherwise fall out, but that when men go out of their element, and meddle with things above their capacity, themselves shall not only go astray and stumble in darkness, but will mislead also divers others with themselves into many mistakings and errors; the proof whereof we have lately had by a book written by Dr. Cowell called the Interpreter: for he being only a civilian by profession, and upon that large ground of a kind of dictionary (as it were) following the alphabet, having all kinds of purposes belonging to government and monarchy in his

Proclamation suppressing the "Interpreter."

The remonstrance of the commons on the subject of proclamations was not unproductive of good. Sir Edward Coke, Chief Justice of the King's Bench, was sent for to attend the council, and was asked by Salisbury (1) whether the king could by proclamation prohibit the building of new houses in London (with the object of checking what was regarded as the overgrowth of the capital), and (2) whether he could in the same way forbid the manufacture of starch from wheat (so as to preserve the latter for consumption of food only). Coke replied that it was a matter of great importance, on which he would confer with the other judges. To this the council reluctantly agreed, and Chief Justice Fleming, Chief Baron Tanfield, and Baron Altham were appointed to consider the matter in conjunction with him. Shortly afterwards the four judges delivered their opinion in the presence of the Privy Council. The king, they said, could not create any new offence by his proclamation: for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment. But the king might admonish his subjects to keep the existing laws, on pain of punishment to be inflicted by the law. Further, the king could not by proclamation make an offence punishable in the Star Chamber, if it were not already by law under the jurisdiction of that court. They also formally declared that the king had no prerogative but what the law of the land allowed him. By their firmness on this occasion the judges rendered an important service to their country. A check was given to the exercise of arbitrary power in this direction, and for some time

Answer of the judges as to the legality of proclamations.

way by meddling in matters above his reach, he hath fallen in many things to mistake and deceive himself: In some things disputing so nicely upon the mysteries of this our monarchy, that it may receive doubtful interpretations; yea, in some points very derogatory to the supreme power of this crown; in other cases mistaking the true state of the parliament of this kingdom and the fundamental constitutions and privileges thereof: and in some other points speaking unreverently of the common law of England and the works of some of the most famous and ancient judges therein; it being a thing utterly unlawful to any subject, to speak or write against that law under which he liveth, and which we are sworn and are resolved to maintain. Wherefore," &c. See the proclamation in Preface to the 1708 edit. of the "Interpreter."

no proclamation imposing fine and imprisonment was issued (*z*).

The "Great Contract."

Another measure which occupied much of the attention of the king and parliament during this and the following session was what was termed the "Great Contract." The commons were desirous of getting rid of the irksome incidents of tenure in chivalry and the right of purveyance. After a great deal of negotiation between the parties, it was at length agreed that the king should receive the sum of £200,000 yearly as compensation for the abolition of both these feudal sources of revenue. The matter was adjourned to the next session of parliament; but in the meantime the commons had grown lukewarm. They were impressed with a sense of the insecurity of any contract made with the king in face of the doctrines maintained by himself and by the court lawyers, of a paramount royal prerogative uncontrollable by any statute. They were apprehensive that if the king's wants were fully supplied by a permanent grant, he might in future be tempted to govern without summoning parliaments; they were especially dissatisfied with his steady refusal to admit of any change, however slight, in the ceremonial of the national church, or of any reform in the system of the ecclesiastical courts, whose jurisdiction the bishops were persistently attempting to emancipate from all control by the courts of common law. James, too, on his part, appears to have become less eager to carry out the contract. It was represented to him that after all he would not gain much by the bargain; that by a little more care in managing the crown lands, by putting in force with the utmost rigour all the rights which he possessed against his subjects, he might obtain the required revenue without having recourse to parliament, and so retain his prerogative undiminished (*a*). It became evident that the scheme must

(*z*) 12 Reports, 74. [See Maitland, Const. Hist., pp. 268-271; and Gardiner, Hist. of Engl., vol. ii. pp. 36-39. - Ed.] [For a modern judicial authority that the purpose of a royal proclamation is to notify the existing law, and that it can neither make nor abrogate law, see *Ex parte Chavasse; In re Grazebrook* (1865), 4 De G. J. & S. at p. 662.]

(*a*) Gardiner, Hist. Eng. [1603-1616], i. 478; Parl. Deb. 1610 (Camd. Soc.), p. 163. ["James I. set to work," Taylor (Origin Engl. Const., p. 599) remarks, "to intensify the growing prejudice against the monarchy by

fall through; and Salisbury then pressed the commons for a supply for the king's immediate necessities. But the commons were in no humour to grant a subsidy unless the whole of their just grievances were redressed. If the king would not give way they were determined to fall back upon their right to refuse supplies. Some sharp things were said of the king's prodigality to his Scottish favourites; impatient and angry, he adjourned the House; and shortly afterwards the parliament was finally dissolved, after an existence of nearly seven years.

James attempts to rule without parliament. 1611-14.

For the next three years James endeavoured to rule without having recourse to parliament (*b*). His great difficulty was the financial one. His own extravagance, and the prodigality with which he rewarded the worthless favourites of his court, had involved him in a heavy debt and raised the ordinary expenditure far above the crown revenues. A vigorous effort was made to raise funds. Loans on privy seals were demanded, often unsuccessfully, from such as were supposed most capable of bearing the burden; the arrears of fines inflicted in the Star Chamber were rigorously exacted; the king of France was induced to pay up an old debt of £65,000; the Dutch were successfully pressed to liquidate their debt, contracted with Elizabeth, by annual instalments of £40,000; several peerages were sold at £10,000 apiece; and a new order of hereditary knights, called baronets, was created, each of whom paid £1,000 for his patent. In addition, large sums were raised

Means used to raise money.

the intervention of the new theory of absolute sovereignty known as the divine right of kings—a theory which Filmer afterwards elaborated into a definite system. Out of the conflict which thus arose between two antagonistic political systems, and between two irreconcilable political theories, grew the constitutional struggle between the parliament and the monarchy which actively began when the first Stuart king dissolved his first parliament. The first stage of the struggle, which occupied the remainder of the reign of James I., was, upon the part of the monarchy, a period of constant aggression—upon the part of the parliament, a period of resistance and preparation. During this period it was that the aroused national assembly opened its ancient armoury, and took from it such weapons of parliamentary warfare as the right of impeachment, the right to debate all matters of public concern, the exclusive right to authorise taxation, the exclusive right to try contested elections, the right to remonstrate against the unauthorised use of the royal prerogative."—Ed.]

(*b*) ["His whole reign," writes Gneist, Hist. Engl. Const., p. 546, "was a weak succession of protests."—Ed.]

by the sale of crown lands. But such resources were clearly temporary and inadequate. At the beginning of 1614 the king's liabilities amounted to £680,000 as contrasted with £300,000 at which they had stood at the opening of the session of 1610, whilst the actual expenditure exceeded the income by £200,000 (*c*).

For some time it had been evident that parliament must be summoned; a course which had always been consistently recommended to the king by Bacon and by Sir Henry Nevill, who, though an opposition member in the late parliament, had since been seeking the post of secretary of state. In a very statesmanlike memorial Nevill assured the king that it was a mistake to suppose that the opposition in the late parliament had arisen from factious motives. He had himself lived on familiar terms with the leaders of the opposition, and was able to affirm without fear of contradiction that they bore no ill-will towards the king. He was ready to undertake for the greater part of them that, if the king would act fairly by his people, he would find these men ready to exert themselves in support of the government. It would, of course, be necessary to grant certain things upon which those who would be called to pay the subsidies had set their hearts. Let the king consider what had been demanded, and what had been promised in the last session, granting the most reasonable of the commons' requests, in addition to performing all his own promises. Let him avoid any speech likely to excite irritation, and appear confident of the parliament's good affections, yielding what he meant to yield without waiting to be pressed. Let him communicate such proposals as he wished to lay before the commons, not through a member of the House of Lords, but either by his own mouth or by such of his ministers as were members of the Lower House, and let him request the commons to nominate a committee which might confer with him on all points on which any difference should arise between them (*d*).

Bacon also strongly advised the king to summon a parliament, but his advice was much less straightforward and

(*c*) For the financial details of James's reign from 1603 to 1616, see Gardiner, Hist. England.

(*d*) See the memorial in Gardiner, Hist. Eng. (1603-1616).

moral than that of Sir Henry Nevill. He submitted that there were many expedients for judiciously managing a House of Commons; that some of those who had been most forward in opposing were now won over, such as Nevill, Yelverton, Hyde, Crewe, Dudley Digges; that much might be done through intimidation or flattery towards filling the House with well-affected persons, winning or blinding the lawyers—the "*litera vocales* of the House"—and drawing the country gentlemen, the merchants, and the courtiers to act for the king's advantage. The king might voluntarily tender such graces and modifications of his prerogative as might with smallest injury be conceded, in order to save the more important parts unimpaired (*e*). Besides Nevill, who had offered to undertake, on behalf of the future House of Commons, that if the king would concede the chief points in dispute the House would not be niggardly in granting supplies, there were some others who appear to have engaged, not only to facilitate the king's dealings with the House, but to influence the elections. The project of these men, who, in the phraseology of the day, were termed the "Undertakers," soon leaked out, and excited much indignation throughout the country. The belief that a general attempt was being made to pack the parliament caused the government candidates to be rejected on all sides. Of the members returned to Westminster, three hundred, or nearly two-thirds of the whole assembly, were elected for the first time, the constituencies having evidently looked out for men who represented the determined spirit of the nation even more strongly than the members of the late parliament had done (*f*).

The "Undertakers."

Parliament met on April 5, 1614. In the king's speech certain concessions were offered, but of slight constitutional importance.

Second Parliament, 1614.

(*e*) Cott. MS. Titus F. iv., ff. 328, 330, 332, cited by Gardiner.

(*f*) Gardiner, Hist. Eng., ii. 147. "Amongst those who were thus elected were two men who were to set their mark upon the history of their country. Sir Thomas Wentworth, a young man of twenty-one, and heir to a princely estate in Yorkshire, represented the great county of the north; and John Pym, a Somersetshire country gentleman, nine years older than Wentworth, was sent to the House of Commons by the little borough of Calne."—*Ibid.*

Impositions denounced.

The commons were not to be satisfied with these small instalments of justice. They went at once to the old grievance of impositions. A unanimous vote was passed against the king's right of imposing taxes without the consent of parliament; and a conference on the subject was demanded of the lords. The lords requested the advice of the judges on the legal point; but this was adroitly refused by the mouth of Chief Justice Coke, on the ground that the question might come before them judicially. The lords, finally, declined the conference; but in the course of their debate an incident occurred which caused much excitement in the Lower House. Neile, Bishop of Lichfield, a sycophantic seeker after power and place, indulged in very abusive language towards the commons. The Lower House immediately demanded satisfaction from the lords. The bishop, when called upon to explain his words, protested "with many tears" that he had been misconstrued and never meant to speak any evil of the commons. The lords acquainted the Lower House with what had passed, but expressed an opinion that in future no member of their House ought to be called in question on the ground of common fame alone. The king now sent a message that unless the commons proceeded forthwith to treat of supply, he should dissolve parliament. But it was too late for intimidation. They declared that they would first proceed with the business of impositions before taking supply into consideration. A few days later, on June 7, James dissolved the parliament, which, from the circumstance of its not having passed a single bill, was nicknamed "the Addled Parliament." It had sat a little more than two months.

"The Addled Parliament" dissolved, 7 June, 1614.

Members sent to the Tower.

The sudden dissolution of parliament was not sufficient to appease the exasperation of James. Four members who had distinguished themselves by the warmth of their language, Wentworth, Hoskins, Christopher Nevill (a younger son of Lord Abergavenny), and Sir Walter Chute, were sent to the Tower. Sir Edwin Sandys and four other members were ordered, at the same time, not to leave London without permission, while Sir John Savile, Sir Roger Owen, Sir Edward Phelips, and Nicholas Hyde were punished by dismissal from the Commission of the Peace.

This intemperate action of James committed him still more deeply to the conflict with the House of Commons. His position towards that assembly had, in fact, already become untenable. "No political truth," observes Gardiner, "has been more completely demonstrated by experience than that which declares the impossibility of the co-existence, for any long time, of an hereditary sovereign and a representative legislature, wherever no right of control is recognised as existing either in the legislature itself, or in the nation which it represents. James might choose one of two courses: he might attempt to deprive the parliament of its representative character, by refusing to allow it to express the wishes of the nation, or he might give it a control over the executive government. No middle way was possible. Supported by his council, by his own ideas of his rights as a king, and by a few precedents from the reign of Elizabeth, he chose the former alternative. To this step of his there could be but one reply. Misgovernment had been met by the commons with refusal of supplies. Imprisonment of their members, it might safely be predicted, would be answered whenever they met again, by impeachment of the ministers of the crown" (*g*). The conflict with the commons.

During the next six years James pursued a career of arbitrary government unchecked by the existence of parliament. To supply the wants of his treasury, recourse was again had to the old expedients of forced loans, monopolies, heavy fines, and the rigorous exactions of the old feudal payments. At the time of the dissolution some of the bishops offered the king a contribution to help him out of his difficulties. In a few days their example was followed by the principal nobility and officers of the court; and a resolution was then taken to call upon all England for a general benevolence. Letters were written by the Council to the sheriffs and magistrates in each county and borough, calling upon them to collect and send in contributions from all persons of ability (*h*). Although care was taken to represent these payments in the character of voluntary contributions, the council in their letters did not hesitate to give very strong hints that it would not be Six years of arbitrary government. 1614-20.

A general benevolence.

(*g*) Gardiner, Hist. Eng. [1603-1616], ii. 166.
(*h*) See Hamilton, Quarter Sessions from Elizabeth to Anne, *passim*

well with those who refused to pay. It was significant that the judges of assize were specially charged with the task of recommending payment (*i*), a mischievous resuscitation of the blended judicial and fiscal functions of the ancient justices itinerant. But despite all the exertions of the court only a very small sum was with much difficulty and pressure obtained. The bishops, courtiers, and City of London had contributed £23,500 previously to the general appeal. From the general appeal itself, extending over nearly three years, the total sum obtained from the people of England was no more than £42,600 (*k*). In several counties the sheriffs and magistrates sent up united protests against the demand, appealing to the Act of 1 Richard III. c. 2 against benevolences, and expressing their unwillingness to injure their posterity by establishing a bad precedent (*l*).

Imprisonment of Mr. Oliver St. John.

Mr. Oliver St. John, on being applied to by the Mayor of Marlborough for a contribution, replied in a letter in which he maintained that all such contributions were contrary to Magna Carta and other statutes, including the well-known Act of Richard III., and that it was improper for private individuals to oppose their judgment to that of the commons in parliament who had refused to grant any supply. He concluded, somewhat intemperately, by charging the king with breaking the coronation oath, and declaring his belief that all who paid the benevolence were supporting their sovereign in perjury. This letter having come to the knowledge of the council, St. John was sent for to London, committed to the Tower, and sentenced by the Star Chamber to pay a fine of £5,000, and to be imprisoned during the king's pleasure. The fine was afterwards remitted, but he was not set at liberty for some time.

Prosecution of Peacham, 1615.

At this time the king and council were also engaged in investigating another affair, which was probably clothed with an importance which it did not possess in consequence of the excited feelings roused by the levy of the benevolence. Edmund Peacham, rector of Hinton St.

(*i*) Gardiner, Hist. Eng. [1603-1616], ii. 172.
(*k*) *Ibid.*
(*l*) Privy Council Register, cited by Gardiner [*Ibid.*], *App.* VI.

George, Somersetshire (one of the counties which had taken the lead in remonstrating against the benevolence), had recently been prosecuted in the High Commission Court for a libel on his bishop and on the Consistory Court, and was sentenced to be deprived of his orders. While the prosecution was pending, his house was searched, apparently for papers connected with the alleged libel, and the officials happened to alight upon a manuscript treatise in the form of a sermon, together with some loose sheets, containing, in very offensive language, such an attack upon the personal conduct of the king and the actions of his ministers, as would undoubtedly, if published, have amounted to a seditious libel. These writings were submitted to the council, who, there is little doubt (though there is no direct evidence on the point), jumped to the conclusion that Peacham's sermon, instead of being an isolated piece of puritanic intemperance, had been prepared in connection with an organised conspiracy of the Somersetshire gentry (*m*). Peacham was put to the rack and examined, as it is expressed by Secretary Winwood, "before torture, in torture, between torture, and after torture," in the vain expectation that he would reveal a plot which had never existed. No conspiracy or shadow of a conspiracy having been detected, the king and his council determined to proceed directly against the prisoner, not for a seditious libel, but for treason, under the statute of Edward III., in compassing the king's death. The only semblance of evidence of an overt act of treason was the manuscript sermon, never preached, nor necessarily intended to be preached. James directed the attorney-general, Bacon, to confer with the judges of the King's Bench separately, in order to ascertain, and probably to influence, their opinion. Chief Justice Coke objected (so Bacon reported to the king), that "such particular, and, as he called it, auricular taking of opinions was not according

(*m*) In consequence of the resistance to the benevolence shown by the county of Somerset, three of its magistrates had recently been summoned before the council to receive a lecture on the impropriety of their conduct. Of these, one, Sir Maurice Berkeley, was known to have been in communication with Peacham at the time of the last parliament, and another, John Paulet, was his immediate neighbour, and had presented him with the living of Hinton.—Gardiner, Hist. Eng. [1603-1616], ii. 181.

to the custom of the realm" (*n*). The three puisne judges made no difficulty in giving an opinion favourable to the crown; and Coke, finding himself unsupported by his brethren in his resistance to separate and private consultation of the judges, at length consented to give a written opinion, which proved, however, by no means satisfactory. Of the two grounds for questioning the treasonable nature of Peacham's writing, first, that it had never been published, secondly, that even if it had been published, it did not amount to treason, Coke appears to have passed over the first, but asserted boldly that no mere declaration of the king's unworthiness to govern amounted to treason (*o*). Peacham was brought to trial at the Taunton assizes, convicted, and sentenced to death. He was not, however, executed, but died in gaol about seven months afterwards.

Collision between the king and Chief Justice Coke.

For some time there had been indications of an impending collision between the king and the Chief Justice of the King's Bench. Now that James was at open war with the representatives of the nation, and was determined to govern as long as possible without the co-operation of a parliament, the only power in the state which he had to fear was the judicial power. It was impossible to prevent cases involving questions of the utmost constitutional importance from being submitted, as they arose from time to time, to the decision of the judges of the land. They were the authorised exponents of the existing law, and thus possessed the power, if so minded, effectually to check the encroachments of the royal prerogative.

Prior to Coke's accession to the bench, the judges had shown themselves, on the whole, sufficiently favourable to the prerogative. No reasons could be more satisfactory to the crown than those upon which the judges had founded their decisions in the celebrated cases of the

(*n*) Bacon's Works (ed. Montagu), xii. 124. Coke's objection was not to the consultation of the judges by the king, but to their being consulted separately. At a later time he expressed himself against the propriety of the law-officers consulting the judges at all (3 Inst. 29), and quoted a conclusive precedent in his favour from the Year Books; but this point was never raised on the present occasion.—Gardiner, Hist. Eng. [1603-1616], ii. 186.

(*o*) "Innovations of Sir E. Coke," Bacon's Works (ed. Montagu), vii. 404.

Post-nati and of the Impositions (*p*). But Coke early developed upon the bench a sturdy personal independence, and a determination to appeal on all occasions to the supremacy of the law, which frequently brought him into conflict with the king and the ecclesiastical and courtly supporters of the king's absolute power (*q*). The claim, pertinaciously asserted by the king and his council, to interfere with the opinions of the judges in every case in which the rights of the crown were in the slightest degree involved, was met by Coke with as pertinacious a denial.

The *Case of Commendams.* 1616.

Matters were brought to a crisis, in 1616, by the proceedings in what is known as the "Case of Commendams." During the time that Bishop Neile held the see of Lichfield, he had received from the king the grant of a living to be held "*in commendam*," that is, along with his bishopric. Two persons named Colt and Glover brought an action against the bishop on the ground that the presentation was theirs, and not the king's, and they further pleaded that, owing to certain legal objections, the king's grant was invalid in itself. On account of its great importance, the case was adjourned into the Exchequer Chamber before all the twelve judges. The king, hearing that his prerogative was likely to be called in question, deputed Bishop Bilson to sit in court, in his name, whilst the case was being argued, and to report on the language employed. Bilson reported that the counsel for the plaintiffs, besides arguing the special points of the case, had disputed the king's general prerogative to grant a commendam. Hereupon James directed the attorney-general Bacon to write to the chief justice, ordering him and the rest of the judges not to proceed to judgment until they had spoken with the king. Coke shortly replied that if it was wished that the other judges should receive the information just given to him, Bacon

(*p*) *Supra*, pp. 482, 483-484.

(*q*) See, in particular, the case of *Brownlow* v. *Mitchell*, and Bacon's argument on the writ *De Rege Inconsulto* (Works, vii. 683), and the case of *Glanville and Courtney*, which gave rise to Coke's quarrel with the Chancery (Cro. Jac.). The facts are concisely stated in Gardiner, Hist. Eng. 1603-1616), ii. 266-271.

had better write to them himself. This was done; but the next day, the judges, as if nothing had happened, proceeded with their arguments. On the day following, they despatched a letter to the king, signed by all the twelve, informing his Majesty that, as they were unanimously of opinion that the attorney-general's letter was contrary to law, they felt bound by their oaths to pay no attention to it, and had accordingly proceeded with the case on the appointed day.

The king, who was then at Newmarket, returned answer that the present case was one which concerned not merely the interests of private persons, but in which he himself was to all intents and purposes a party; that delay was necessary in order that he might lay before them his own case, and that the oath not to delay justice was not meant to prejudice the king's prerogative; and concluded by commanding them, of his absolute power and authority royal, not to proceed further in the cause till they should hear his pleasure from his own mouth. On his return to London, the twelve judges were summoned before the king and his council. James personally expatiated upon their misdemeanours both in substance and in the form of their letter, certifying him merely what they had done, instead of submitting to his judgment what they should do. He told them it was their duty to check those advocates who presumed to argue against his prerogative; that the popular lawyers were the men who, ever since his accession, had trodden on his prerogative in all parliaments (*r*);

Independence of the bar assailed.

(*r*) James was careful to do what he could to repress the independence of the bar. In 1607, Nicholas Fuller, a bencher of Gray's Inn (who had sat in James's first parliament, and was returned for the City of London in 1614), was employed by two puritans, Ladd and Maunsell, committed by the High Commission Court for refusing the oath *ex officio*, to move for their habeas corpus. This he did on the ground that the commissioners had no power to fine or imprison under the statute of Elizabeth (1 Eliz. c. 1). Although this interpretation was not accepted by the judges at the time, the language of the statute was such as to admit of argument. On the ground that he had slandered the king's authority by questioning the power of the commission, Fuller was himself summoned before the High Commission Court, fined £200, and committed to prison. In 1613, James Whitelocke, a barrister who had been brought into notice in James's first parliament by his great speech on impositions, was summoned before the Star Chamber on the charge of having given a private opinion to his client

that his prerogative was double, the one ordinary, having relation to private interests, and which might be and was every day disputed in Westminster Hall; the other of a higher nature, referring to his supreme and imperial power and sovereignty, which ought not to be disputed or handled in vulgar argument: but that of late the courts of common law had grown so vast and transcendent, as both to meddle with the king's prerogative and encroach upon all other courts of justice. As soon as he had concluded, all the judges fell upon their knees and asked pardon for their error. But Coke, though he joined in demanding pardon, entered on a justification of their conduct, reiterating his opinion that the postponement required by the king was in fact a real delay of justice, contrary to the law and their oaths. At the desire of James, the lord chancellor Ellesmere and the attorney-general Bacon then delivered their opinions, which were directly opposed to that of the chief justice. The following question was then put to the judges, one by one: "Whether, if at any time in a case depending before the judges, his Majesty conceived it to concern him either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly?" All, except Coke, fearful of offending the king, to whom they owed all their future prospects of professional advancement, promised to act in future according to the royal wishes. But from Coke no answer could be extracted than that, whenever such a case should come before him, he would do what was fitting for a judge to do. The noble conduct of the chief justice on this occasion has deservedly obtained for him the admiration of posterity. Rather than prostitute the independence of the judicial bench to the arbitrary interference of the king, he showed himself ready to sacrifice, for conscience' sake, the high position

that a commission issued by the king to inquire into the state of the navy was illegal, on account of certain directions contained in it, as to punishing offenders, which Whitelocke considered contrary to the well-known clause of Magna Carta. He was committed to the Fleet, but, on making humble submission, was set at liberty.—*Fuller's case*, 12 Rep. 41; Whitelocke's Liber Famelicus, 33-40, 113-118; Gardiner, Hist. Eng. [1603-1616], i. 443; ii. 109.

to which his own merits had raised him. Within a few weeks he was censured by the council and suspended from his office, and not long afterwards, in November 1616, received notice that he had ceased to be chief justice (*s*).

Coke's disgrace an historical landmark.

"With the disgrace of Coke," observes Mr. Gardiner, "the period of transition between the history of the Tudors and the history of the Stuarts comes to an end. It is a great historical landmark. Up to this time James had been busy in acquiring the powers which were afterwards to be used with such fatal results to himself and to his son. By the deprivation of Coke he obtained at a blow all that he had been seeking by more devious courses. The common law judges now held their offices practically, as well as theoretically, at the good pleasure of the sovereign. From henceforward the prerogative was safe from attack in the courts of law. From henceforth, too, it stood on its own merits, and could no longer expect to obtain that moral support which it had hitherto received from the decisions pronounced from the bench by judges who were, comparatively at least with those who held office subsequently to Coke's disgrace, independent of the favours and the anger of the crown" (*t*).

Foreign policy of James.

The foreign policy of James was scarcely, if at all, less irritating to his people than his domestic misgovernment. On coming to the throne he immediately declared for peace with Spain, regardless of the wishes of the great body of Englishmen, who, looking with twofold indignation on the Spanish power as the great supporter of popery and tyranny, and feeling bound in honour not to desert their old allies the Dutch in their gallant and now at length hopeful struggle for independence, were eager to carry on the war. James, however, was not only by nature averse from all war, but his notions of the divine right of kings

(*s*) Hallam, Const. Hist., i. 346-349; Gardiner, Hist. Eng. [1603-1616], ii. 272-283.

(*t*) Hist. Eng. (1603-1616), ii. 284, 326. [Gneist, Hist. Eng. Const., p. 550, note, remarks, "The perversion of the position of the courts of justice begins, as a dynastic feature, contemporaneously with the accession of the Stuarts. James I. declared to his judges that he would himself decide legal questions, as he had been told that law depended upon common sense, and he was as well furnished with that as were his judges."—Ed.]

caused him to regard the Dutch war in particular as a contest of rebels against their lawful sovereign, and therefore undeserving of any assistance from him. There were indeed many circumstances in the condition of England at the death of Elizabeth which rendered an honourable peace with Spain highly desirable; but not content with peace, James must needs run counter to the whole current of national feeling and prejudice, by setting his heart upon a marriage between his son and the infanta. The unfeeling execution of Sir Walter Raleigh (Oct. 29, 1618), under a sentence of treason passed fifteen years previously, on evidence which was generally considered to be inconclusive, was regarded by the nation as a mean truckling to the revengeful demands of the court of Madrid; and the policy of alliance with Spain became still more odious after the outbreak of the war in Germany, in which the king's son-in-law, Frederick, Elector Palatine, was driven out of his hereditary dominions by the emperor. Despite his pacific temper, James was roused to attempt the restoration of his son-in-law, but while he was anxious to effect his object through the friendly mediation of Spain, the nation was clamouring to support the protestant interest in Germany by force of arms. In this state of affairs the ministers advised the king to take advantage of the war enthusiasm to summon a parliament, and James reluctantly gave his consent.

Third parliament, 1620-1.

James's third parliament met on January 30, 1620-1, and was opened with a conciliatory speech from the throne. The commons made some complaints of the imprisonment of four of their members, at the close of the parliament of 1614, for words spoken in the House; but the matter was allowed to drop on certain explanations being given by Mr. Secretary Calvert, and an assurance from the king that he would faithfully maintain the privilege of freedom of speech demanded by the House. Two subsidies were then voted.

On the motion of the ex-chief justice, Sir Edward Coke, a committee of inquiry into grievances had been early appointed. The first abuse to which their attention was directed was that of monopolies, and this led to the revival

of the ancient right of parliamentary impeachment—the solemn accusation of an individual by the commons at the bar of the lords—which had lain dormant since the impeachment of the Duke of Suffolk in 1449 (*u*).

Revival of impeachment.

Under the Tudors impeachments had fallen into disuse, partly through the subservience of the commons, and partly through the preference of those sovereigns for bills of attainder, or of pains and penalties. Moreover, the power wielded by the crown through the Star Chamber enabled it to inflict punishment for many state offences without resorting to the assistance of parliament. With the revival of the spirit of liberty in the reign of James I., the practice of impeachment revived also, and was energetically used by the commons in the interest alike of public justice and of popular power. In the session of 1621, the commons impeached Sir Giles Mompesson and Sir Francis Mitchell, who, as patentees for the exclusive manufacture of gold and silver thread, for the licensing of ale-houses, and for the inspection of inns and hostelries, had been guilty of gross fraud, violence, and oppression. The lords passed judgment on both, condemning them to be imprisoned, fined, and degraded from the honour of knighthood (*w*).

Mompesson and Mitchell, 1621.

The impeachments of Mompesson and Mitchell were followed up by others against Sir John Bennett, judge of the Prerogative Court of Canterbury, for corruption in his office; and Field, Bishop of Llandaff, for brocage of judicial bribery. As yet the commons had only attacked private persons; a much more important step was the impeachment of Lord Chancellor Bacon, which revived the

Lord Chancellor Bacon, 1621.

(*u*) In 1534 the commons had complained to the lords of the conduct of Stokesley, Bishop of London, and called upon him to make answer. But the lords declared that it was unbecoming of any lord of parliament to make answer in that place; and the proceeding has not generally been regarded as a case of impeachment.—Lords' Journals, i. 71; Hallam, Const. Hist., i. 357, *n*. The proceedings against Wolsey in 1529 have sometimes been termed an "impeachment," but inaccurately. Articles against him were first presented to the Upper House and then sent down to the commons, who rejected them, chiefly through the eloquent defence of his patron made by Thomas Cromwell.—Lingard, vi. 160.

(*w*) Mompesson had escaped beyond sea, but Mitchell suffered his punishment.

right of impeaching the king's ministers. He was found guilty by the lords of receiving bribes from the suitors of his court, and condemned to pay a fine of £40,000, to be imprisoned in the Tower during the king's pleasure, to be for ever incapable of any office, place, or employment, and never again to sit in parliament (*x*). The constitutional right, revived by the proceedings against Bacon, was confirmed and completely re-established by the impeachment, in 1624, of Lionel Cranfield, Earl of Middlesex, Lord Treasurer of England, for bribery and other misdemeanours. On his trial he maintained his innocence with much spirit, and bitterly complained of the law which denied to him the benefit of counsel's assistance. He was unanimously convicted, but his remonstrance on the harshness of the law induced the lords to make an order that in future cases of impeachment the accused should be furnished with copies of the depositions for and against him, and that on demand he should be allowed the aid of counsel (*y*).

Lord Treasurer Middlesex, 1624.

Not content with reasserting their ancient right of impeachment, the commons, in the session of 1621, were hurried by their zeal against popery and their enthusiasm for the protestant Elector Palatine, into an act which was at once an invasion of the judicial rights of the lords and a piece of gross and cruel injustice. It came to the knowledge of the House that Edward Floyd, a Roman catholic barrister, then a prisoner in the Fleet, had expressed his satisfaction that "goodman Palsgrave and goodwife Palsgrave" (the Palatine and his consort) had been driven from the city of Prague. The commons, who suspected James of being very lukewarm in his son-in-law's cause, appear to have been lashed into a sudden paroxysm of rage by this flippant expression. Floyd was condemned by the House to pay a fine of £1,000, to stand in the pillory in three different places for two hours each time, and to be carried

Violent proceedings against Floyd.

(*x*) It is to the credit of James that, recognising the transcendent genius of the great philosopher, he mercifully released him from the Tower after a short confinement, remitting the fine and the other parts of the sentence, and conferred upon him a pension of £1,800.

(*y*) Lords' Journal, 307-383, 418.

[On later cases of impeachment, see *infra*, pp. 631 *seq.*]

from place to place on horseback, without a saddle, with his face to the horse's tail, and the tail in his hand. The lords, considering this proceeding to be an infringement of their privileges, requested a conference with the commons. As early as the first year of Henry IV., an entry on the rolls of parliament had declared that the judicial power of parliament did not belong to the commons (*z*), and in this very session they had come to a vote, prior to impeaching Mompesson, that they had no jurisdiction over cases which did not concern the privileges of their House. Without now formally confessing themselves in the wrong, they agreed that the prisoner should be arraigned before the lords, and entered a declaration in their journals that the proceedings in the Lower House should not be "drawn or used as a precedent to the enlarging or diminishing of the lawful rights or privileges of either House" (*a*).

The parliament had now sat four months busily engaged in impeachments, inquiries into grievances, and the preparation of bills of reform, but without paying any attention to the king's request for a further supply in addition to the two subsidies already granted. Impatient at the delay and tired of listening to grievances, the king, much to the chagrin of the commons, adjourned parliament till November.

Prosecution of Coke and Sandys.

When the commons re-assembled in November they were in anything but a complacent frame of mind. During the recess, proceedings had been taken by the court party against Sir Edward Coke and Sir Edwin Sandys, two of the most popular parliamentary orators, which, though not ostensibly grounded on their conduct in the House, were believed to be due to that cause. A prosecution had been commenced against Coke on a charge of misdemeanour connected with the discharge of his late judicial functions, and Sandys had been arrested, together with Selden, his legal adviser, examined before the council, on some secret

(*z*) *Supra*, pp. 298-299; Rot. Parl., iii. 427.

(*a*) Parl. or Const. Hist., v. 435. By the lords, Floyd was adjudged, in addition to the punishment of the pillory, to pay a fine of £5,000, to be degraded from the estate of a gentleman and held infamous, to be whipped at the cart's tail from the Fleet to Westminster Hall, and to be imprisoned for life in Newgate. On the following day, the whipping was remitted on a motion of Prince Charles.—Lords' Journ., 148.

charge, and kept in confinement for a month. The commons took up the cause of their members with great warmth. The accusers of Coke were ordered to be taken into custody by the serjeant-at-arms, and a committee was appointed to examine witnesses with the view of establishing the fact of a conspiracy against him, originating in hostility to his political conduct. Sandys was absent through illness, but although Mr. Secretary Calvert declared that his arrest had no connection with his speeches in the House, two members were appointed to visit him and solicit a disclosure of the truth (*b*).

Irritation of the commons thereat.

While expressing themselves willing to grant a moderate subsidy, the commons resolved first of all to enter upon the question of grievances. On the proposition of Sir Edward Coke, a petition was drawn up against the growth of popery. It asserted that both the pope and the king of Spain were aspiring to universal dominion, the one in spirituals, the other in temporals; that to these two powers the English papists looked for support; and that their hopes had been recently raised by the report of an intended marriage between the Prince of Wales and the infanta of Spain: the House therefore prayed that the king would marry his son to a protestant princess, and would order an expedition to be sent against that power (meaning Spain) which first maintained the war in the Palatinate. The king having furtively obtained a copy of this petition, before its presentation, wrote a peremptory letter to the Speaker, forbidding the House to meddle generally with mysteries of state, and in particular not to speak of his son's match with the daughter of Spain, or touch the honour of any prince his friend or ally. Sandys' commitment, he told them, was not for anything in his public conduct; adding, however: "We think ourselves very free and able to punish any man's misdemeanours in parliament, as well during their sitting as after; which we mean not to spare hereafter, upon any occasion of any man's insolent behaviour there that shall be ministered unto us" (*c*). Undismayed by the king's menacing language, the commons presented to him a strong but respectful

Petitions against popery and the Spanish match.

James forbids the House to "meddle with mysteries of state."

Remonstrance of the commons.

(*b*) Com. Journ., 643, 644, 662: Lingard, ix. 193.
(*c*) Parl. or Const. Hist., v. 492.

justification of their conduct, in which, adverting to that part of the king's message which threatened them for freedom of speech, they claimed the privilege as their "ancient and undoubted right, and an inheritance received from their ancestors" (*d*). In a long, laboured, and sarcastic reply, James dwelt at length on their unfitness for meddling with matters of government far above their reach, commended to them the maxim "ne sutor ultra crepidam," and concluded by remarking that, "although he could not allow of the style calling their privilege an ancient and undoubted right of inheritance, but could rather have wished that they had said that their privileges were derived from the grace and permission of his ancestors (for most of them had grown from precedents, which shows rather a toleration than inheritance), yet he gave them his royal assurance that so long as they contained themselves within the limits of their duty, he would be as careful of their lawful liberties and privileges as of his own prerogative, but so that their House did not touch on that prerogative, which would enforce him, or any just king, to retrench their privileges" (*e*).

The king's reply.

It was impossible for the commons to leave unanswered this explicit attack upon the essential privileges which they claimed as their birthright. On the eve of the Christmas recess, they drew up and recorded in their journal their memorable protestation of December 18, 1621, in these words:—

Protestation of Dec. 18, 1621.

"The commons now assembled in parliament, being justly occasioned thereunto, concerning sundry liberties, franchises, privileges, and jurisdictions of parliament, amongst others not here mentioned, do make this protestation following:

"That the liberties, franchises, privileges, and jurisdictions of parliament, are the ancient and undoubted birthright and inheritance of the subjects of England:

"And that the arduous and urgent affairs concerning the king, state, and defence of the realm, and of the Church of England, and the maintenance and making of laws, and redress of mischiefs and grievances, which daily happen

(*d*) Parl. or Const. Hist., v. 497. (*e*) *Ibid.*, 507.

within this realm, are proper subjects and matter of counsel and debate in Parliament:

"And that in the handling and proceeding of those businesses, every member of the House of Parliament hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion, the same:

"And that the commons in parliament have like liberty and freedom to treat of these matters, in such order as in their judgment shall seem fittest:

"And that every member of the said House hath like freedom from all impeachment, imprisonment and molestation (other than by censure of the House itself), for or concerning any speaking, reasoning, or declaring any matter or matters, touching the parliament, or parliament business:

"And that if any of the said members be complained of and questioned for anything done or said in parliament, the same is to be showed to the king by the advice and assent of all the commons assembled in parliament, before the king gave credence to any private information" (*f*).

Sending for the journals of the commons, James, in the presence of his council, tore up the obnoxious protestation with his own hand. He dissolved parliament; and revenged himself on the "ill-tempered spirits who by their cunning diversions had imposed on him the necessity of discontinuing it," by committing Sir Edward Coke and Sir Robert Phelips to the Tower, and Mr. Selden, Mr. Pym, and Mr. Mallory to other prisons: while Sir Dudley Digges, Sir Thomas Crewe, Sir Nathaniel Rich, and Sir James Perrot were sent in a sort of honourable banishment, to act as Royal Commissioners in Ireland (*g*). "It is worthy of observation," remarks Hallam, "that in this session a portion of the Upper House had united in opposing the court. Their opposition must be reckoned an evident sign of the change that was at work in the spirit of the nation, and by which no rank could be wholly unaffected." This minority in the lords included Oxford, Southampton, Essex, Warwick, Saye, and Spencer. The

Imprisonment of members.

(*f*) Com. Journ., i. 668; Parl. or Const. Hist., v. 512, 513.
(*g*) Parl. or Const. Hist., v. 525.

Earls of Oxford and Southampton were summoned before the council, and the former, on pretence of having spoken words against the king, was committed to the Tower (*h*).

James's fourth and last parliament met on February 19, 1623-4. The abandonment of the projected marriage between the Prince of Wales and the Infanta of Spain, in which the king was reluctantly induced to acquiesce through the interested influence of the favourite Buckingham, rendered the commons unexpectedly complaisant. James on his part exhibited a condescension equally unusual. He submitted for their consideration and advice the matrimonial negotiations with Spain, and the desirability of entering into a war for the recovery of the Palatinate, and even promised, that if they would grant the money for the war, it should be paid into the hands of treasurers appointed by the commons, and that he would not treat of peace without previously taking their advice. The commons voted three subsidies and three fifteenths (about £300,000); and eight citizens were appointed treasurers, and ten other selected persons a council of war, all of whom were to be accountable for their conduct to the commons in parliament (*i*).

Act against monopolies.

Besides confirming their right to impeach the ministers of the crown, by their proceedings against the Earl of Middlesex, to which reference has been already made (*ii*), the commons, in this session, procured the passing of several salutary statutes, of which the most important was a declaratory "Act concerning monopolies, and dispensations with penal laws and the forfeitures thereof." All monopolies; all licences to do, use, or exercise anything against the tenor or purport of any law or statute, or to agree or compound with others for any penalty or forfeiture limited by any statute; all grants or promises of the benefit or profit of any forfeiture or penalty due on any statute, made before judgment thereupon had; and all proclamations, inhibitions, and other proceedings any way tending to the furthering or countenancing of the same or any

(*h*) Hallam, Const. Hist., i. 368.
(*i*) Parl. or Const. Hist., vi. 333.
(*ii*) [*Supra*, p. 505.]

of them—were declared to be contrary to the ancient and fundamental laws of the realm and utterly void (*k*).

On May 29, 1624, James dissolved his last parliament, in which, for the first time throughout his reign, hardly any difference had arisen between the crown and the commons. He died on March 27, 1625. The constitutional results of his reign are thus concisely summed up by Hallam: "The commons had now been engaged for more than twenty years in a struggle to restore and to fortify their own and their fellow subjects' liberties. They had obtained in this period but one legislative measure of importance, the late declaratory Act against monopolies. But they had rescued from disuse their ancient right of impeachment. They had placed on record a protestation of their claim to debate all matters of public concern. They had remonstrated against the usurped prerogatives of binding the subject by proclamation, and of levying customs at the out-ports. They had secured beyond controversy their exclusive privilege of determining contested elections of their members. Of these advantages, some were evidently incomplete, and it would require the most vigorous exertions of future parliaments to realise them" (*l*).

Constitutional results of James's reign.

CHARLES I. 1625-1649.

His political character.

At the age of twenty-five Charles I. succeeded to the throne on the death of his father, March 27, 1625.

Nurtured from his infancy in the doctrine of the divine right and absolute power of kings, which James I. had so industriously promulgated, and which the church, the court, and the judicial bench had openly espoused as the true principles of religion and policy, Charles "came a party man to the throne, and continued an invasion on the

Patents for inventions.

(*k*) 21 Jac. I. c. 3. It is under an exception contained in this Act that the crown has since exercised the right of granting letters-patent for new inventions, which would otherwise have been included in the general declaration against monopolies. It is provided that the Act "shall not extend to letters-patent and grants of privilege for the term of fourteen years and under, thereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor or inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use."

(*l*) Hallam, Const. Hist., i. 373.

people's rights while he imagined himself only concerned in the defence of his own" (*m*). Distrust of his own judgment and too great a deference for the opinions of others, whose ill advice he followed, are the greatest faults admitted by his zealous partisan Lord Clarendon. Unhappy in the choice of his councillors—in Buckingham, Strafford, and Laud, more especially—he certainly was, but it was his own insincerity and innate propensity to intrigue which contributed more than anything else to embitter the struggle between him and his people, and which in the end effectually closed the door against reconciliation. "Faithlessness," observes Macaulay, "was the chief cause of his disasters, and is the chief stain on his memory. He was, in truth, impelled by an incurable propensity to dark and crooked ways. It may seem strange that his conscience, which, on occasions of little moment, was sufficiently sensitive, should never have reproached him with this great vice. But there is reason to believe that he was perfidious, not only from constitution and from habit, but also on principle. He seems to have learned from the theologians whom he most esteemed, that between him and his subjects there could be nothing of the nature of mutual contract; that he could not, even if he would, divest himself of his despotic authority: and that in every promise he had made, there was an implied reservation that such promise might be broken in case of necessity, and that of the necessity he was the sole judge" (*n*).

The first fifteen months of Charles's reign saw two parliaments successively summoned and abruptly dissolved. Guided by the pernicious counsels of Buckingham, his heart was set upon a war with Spain, a war which, though approved by the last parliament of his father, had not yet been declared, and might easily have been avoided. Before commencing hostilities, funds were absolutely necessary, and Charles expected from the commons a large and unconditional grant. But the members of the Lower House were much more impressed with the necessity of securing the redress of grievances and placing the enjoy-

Supplies and grievances.

(*m*) Bolingbroke, i. 516.
(*n*) Macaulay, Hist. Eng., i. [84].

ment of civil liberty upon a secure basis, than eager for the prosecution of the war. They accordingly doled out supplies very sparingly, granting in the first parliament but two subsidies (about £140,000), together with the customs duties of tonnage and poundage for one year only, instead of for the king's life as had for two centuries been the practice (*o*). They had no intention of refusing a further supply, but were resolved to avail themselves of their constitutional right to make it dependent upon redress of grievances. Professing themselves "ready in a convenient time, and in a parliamentary way, to afford all necessary supply to his Majesty upon his present and all other his just occasions," they were equally determined "freely and dutifully to do their utmost endeavours to discover and reform the abuses and grievances of the realm and state." Indignant that they should thus dare to prescribe to him, the king hastily dissolved his first parliament, and endeavoured to raise money upon privy seals (*p*); but within six months he again found it necessary to seek parliamentary aid.

Opposition to Buckingham.

One of the chief causes of the late dissolution had been the desire of Charles to screen his favourite Buckingham from anticipated impeachment by the commons. One of the most learned and moderate members, Sir Robert Cotton, in a significant though apparently humble speech, had reminded the House of the control formerly exercised over the king's ministers, and alluded to "the young and simple counsel" by which the king was led. "We do not desire," he said, "as 5 Henry IV., or 29 Henry VI., the removing from about the king any evil councillors. We do not request a choice by name, as 14 Edward II., 3, 5, 11 Richard II., 8 Henry IV., or 31 Henry VI.; nor to swear them in parliament, as 35 Edward I., 9 Edward II., or 5 Richard II.; or to line them out their directions of rule, as 43 Henry III., and 8 Henry VI.; or desire that which Henry III. did promise in his 42nd year, "se acta omnia

(*o*) The lords refused their consent to this limited grant, and Charles caused the tonnage and poundage to be levied without any parliamentary authority.

(*p*) On the reception which "privy seals" met with in some counties, see Hamilton, Quarter Sessions, Elizabeth to Anne.

per assensum magnatum de concilio suo electorum, et sine eorum assensu nihil." We only in loyal duty offer up our humble desires, that since his Majesty hath, with advised judgment, elected so wise, religious, and worthy servants to attend him in that high employment, he will be pleased to advise with them together a way of remedy for these disasters in state, brought on by long security and happy peace; and not be led with young and simple counsel" (*q*).

Care had been taken to prevent several of the most popular orators of the last parliament from sitting in the new assembly by appointing them sheriffs (*r*) for the year; but this manœuvre failed in its effects. Irritated more than ever against the favourite, the new parliament determined to proceed to his impeachment. Whilst the commons were preparing materials for the charge, the king sent them word: "I must let you know that I will not allow any of my servants to be questioned amongst you, much less such as are of eminent place and near unto me." Buckingham, he assured them, had done nothing without his own special direction and appointment and as his servant. "I wish," he added in conclusion, "you would hasten my supply, or else it will be worse for yourselves; for if any ill happen, I think I shall be the last that shall feel it" (*s*).

Impeachment of Buckingham.

Notwithstanding this haughty message the commons resolved that three subsidies and three fifteenths should be granted to the king: but with a proviso that the bill of supply should only be brought in after they had presented their grievances and received the king's answer. Addressing the king, they declared "that it had been the ancient, constant and undoubted right and usage of parliament to question and complain of all persons of what degree soever, found grievous to the commonwealth, in abusing the power and trust committed to them by their sovereign." And as to the supply, that "though it had been a long custom

View of the commons.

(*q*) Parl. or Const. Hist., vi. 372.

(*r*) Among them were Sir Edward Coke, Sir Robert Phelips, Sir Thomas Wentworth (who had not yet gone over to the court party), and Sir Francis Seymour.

(*s*) Parl. or Const. Hist., vi. 430, 431.

of parliaments to handle the matter of supply with the last of their businesses; yet, at that time, out of extraordinary respect to his person and care of his affairs, they had taken the same into more speedy consideration," and had agreed to a resolution for a present supply (*t*). They subsequently agreed to add a fourth subsidy, and prepared a bill to grant the king tonnage and poundage for life, but directed that concurrently with it a remonstrance should be drawn up against his taking those duties without the previous grant of parliament (*u*).

Members of the commons imprisoned.

Buckingham was now formally impeached (*w*). Two of the managers on the part of the commons, Sir John Eliot and Sir Dudley Digges, were committed to the Tower by the king for alleged insolence of speech. The commons, incensed, declared that they would do no more business until their members were set at liberty. Sir Dudley Carleton, vice-chamberlain of the household, endeavoured to frighten the House into submission by insinuating that the king might very likely be tempted to govern without a parliament, like the princes on the continent. But the commons compelled him to apologise, and a large number of peers having assured the king that Sir Dudley Digges had not spoken the words imputed to him, the two prisoners were shortly afterwards released.

Attack on the privileges of the lords. 1626.

Not contented with attacking the privileges of the commons, Charles was imprudent enough wantonly to provoke a quarrel with the House of Lords. For permitting his son, without the king's licence, to marry a daughter of the Duke of Lennox, a lady of royal blood, the Earl of Arundel (an enemy of Buckingham) was committed to the Tower during the session of parliament. The lords, resenting this attack upon their privileges, resolved, "that no lord of parliament, the parliament sitting, or within the usual times of privilege of parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety for the peace." After a contest

(*t*) *Ibid.*, 464-468. (*u*) *Ibid.*, vii. 36.

(*w*) *Infra*, p. 631.

of three months between the king and the lords, Arundel was at length set at liberty.

Another enemy whom Buckingham specially feared was the Earl of Bristol (John Digby), who having been ambassador to Spain at the time of Prince Charles's visit, had it in his power to make most damaging disclosures concerning the duke's conduct there. Charles refused him a writ of summons to parliament. Bristol complained to the peers of this violation of their common privilege; and the peers insisting, the king sent the writ, but with a letter forbidding the earl to avail himself of it on pain of the royal displeasure. This letter he laid before the House of Lords, and the next day the attorney-general, by the king's order, charged him with high treason at the bar of the House. Bristol retaliated by impeaching the Duke of Buckingham, who thus became the object of two concurrent prosecutions, respectively instituted by the House of Commons and by a former colleague in the late king's service.

To protect his favourite, and at the same time to thwart the pretension of parliament, involved in this attack upon Buckingham, to control the appointment of the ministers of the crown, Charles determined to dissolve parliament. The peers petitioned against this design, but the king angrily replied, "No, not a minute," and the dissolution was immediately declared (*x*).

Expedients to raise money.

By this hasty and ill-advised dissolution before the liberal subsidies conditionally promised had been granted, the king found himself without funds to carry on the war with Spain. He again had recourse to the old illegal methods of raising money. Tonnage and poundage were arbitrarily exacted; commissions were issued to compound with recusants for dispensing with the penal laws: privy seals and benevolences were demanded from the rich; and the seaport towns were ordered to furnish vessels armed and equipped—the first attempt at ship-money. But that which excited the greatest indignation was the levying and exacting of a general loan from every subject, according to the rate at which he had been assessed to the last

(*x*) Parl. or Const. Hist., vii. 290.

subsidy. The common people who refused to contribute were punished by impressment into the navy; many of the gentry were committed to prison; several regiments of soldiers were sent into different counties and quartered upon the inhabitants; and in some places martial law was enforced. Chief Justice Crewe, who refused to admit the legality of the loan, was punished by dismissal from his office.

Darnel's case.

Of the many persons imprisoned throughout England for refusing the loan, five only, Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham and Sir Edmund Hampden (cousin of John Hampden, afterwards so celebrated), sued out their writs of habeas corpus in the King's Bench, to which the Warden of the Fleet returned that they were detained under a warrant from the Privy Council by *special command of the king*. This gave rise to a most important discussion as to the sufficiency of such a return as a legal cause of detention, there being no charge made against the prisoners. Noy, Selden, and other eminent counsel for the prisoners, argued with much ability and learning in favour of the chartered immunity of English subjects from arbitrary detention, against the attorney-general, Sir Robert Heath, who upheld the absolute prerogative of the crown. The judges displayed great moderation and apparent impartiality while the question was being argued; but in the end Sir Nicholas Hyde, chief justice, gave the decision of the court in favour of the crown, and the prisoners were remanded to custody—a custody which, by this judgment, might be indefinitely prolonged, without any specific charge being brought against the prisoners, or any trial with its consequent condemnation or acquittal (*y*). The temporary triumph of the king was dearly bought at the price of the dismay and indignation which it spread among the people, who saw their fundamental right of personal liberty practically annihilated by this decision.

Undeterred by the difficulties which he had encountered in providing for the war with Spain, Charles rashly

(*y*) *Darnel's case*, 3 St. Tr. 1. [*Cf.* Denman's Broom's Const. Law, Note, pp. 204 *seq.*]

entered, at the instigation of Buckingham, upon a fresh war with France. After the disastrous and humiliating failure of the expedition of the favourite to the Isle of Rhé (July 12 –Oct. 12, 1626), the absolute necessity of a large supply for carrying on the war forced the king to summon a third parliament. Previously to its assembling, it was deemed advisable to release the persons imprisoned for refusing the loan. Seventy-eight were thus set at liberty; of whom twenty-seven (Sir Thomas Wentworth, afterwards Earl of Strafford, being of the number) were immediately returned to the new parliament. Charles opened the session with a proud and threatening speech. "There is none here," he said, "but knows that common danger is the cause of this parliament, and that supply, at this time, is the chief end of it. . . . Every man must now do according to his conscience: wherefore, if you (which God forbid) should not do your duties in contributing what the state at this time needs, I must, in discharge of my conscience, use those other means, which God hath put into my hands, to save that which the follies of some particular men may otherwise hazard to lose. Take not this as a threatening (for I scorn to threaten any but my equals), but an admonition from him that, both out of nature and duty, hath most care of your preservation and properties." The lord keeper added: "This mode (of supply), as his Majesty hath told you, he hath chosen, not as the only way, but as the fittest; not as destitute of others, but as most agreeable to the goodness of his own most gracious disposition, and to the desire and weal of his people. If this be deferred, necessity and the sword of the enemy will make way to the others. Remember his Majesty's admonition: I say remember it" (*z*). The commons were not at all disturbed by this menacing language. "We have come together," said Wentworth, who was so soon to desert the popular cause, "firmly determined on vindicating our ancient vital liberties, by reinforcing our ancient laws made by our ancestors; by setting forth such a character of them as no licentious spirit shall dare to enter upon them." They at once resolved themselves into

The king's threatening speech.

Committee of grievances.

(*z*) Parl. or Const. Hist., vii. 339.

a committee of grievances to consider "the liberty of the subject in person and estate." The principal matters discussed were: (1) illegal exactions under the name of loans; (2) the arbitrary commitment of those who refused compliance, and especially the recent decision of the King's Bench remanding Sir Thomas Darnel and others upon a habeas corpus; (3) the billeting of soldiers on private persons; and (4) the infliction of punishment by martial law. After passing resolutions "That no freeman ought to be imprisoned or restrained by command of the king, of the Privy Council, or any other, except for lawful cause expressed in a lawful warrant; and that the ancient and undoubted right of every freeman is, that he hath a full and absolute property in his goods and estate; and that no tax, talliage, loan, benevolence, or other like charge, ought to be commanded or levied by the king or his ministers, without common assent of parliament," the commons applied to the lords for a conference, in order to agree on a petition to the king for a declaratory confirmation of these liberties. For two months the attention of both Houses, either in conference or in separate debate, was almost exclusively devoted to this momentous subject, which was exhaustively argued by Selden, Coke, Littleton, Digges, Noy, and other eminent lawyers on the part of the commons, and by the attorney-general Heath, Serjeant Ashley, and others, as counsel for the crown. In the meantime the commons, anxious not to give the king any just cause of offence, unanimously voted the unusually large amount of five subsidies (£350,000), but deferred the passing of a regular money bill until their grievances should be redressed. The king tried hard to satisfy the commons by offering his royal word not to arrest any one without just cause, or a simple confirmation of the Great Charter and the other ancient statutes in favour of liberty. But Sir Edward Coke warned the House to proceed by bill. "Was it ever known," he said, "that general words were a sufficient satisfaction for general grievances? The king's answer is very gracious; but what is the law of the realm? that is the question. I put no diffidence in his Majesty; but the king must speak by record, and in particulars, and not in

Commons' resolutions.

Conference with the lords.

Speech of Coke.

general. *Let us put up a Petition of Right;* not that I distrust the king, but that I cannot take his trust, save in a parliamentary way" (*a*).

Petition of Right drawn up by the commons.

The Lords' amendment rejected.

The Petition of Right was then drawn up by the commons. The lords vainly proposed as an amendment: "We humbly present this petition to your Majesty, not only with a care of preserving our liberties, but with due regard to leave entire that *sovereign power* wherewith your Majesty is trusted for the protection, safety, and happiness of your people." This insidious saving clause was firmly rejected by the commons. "Let us look into the records," said Mr. Alford, a member, "and see what they are: what is 'sovereign power'? Bodin saith that it is free from any conditions. By this we shall acknowledge a regal as well as a legal power. Let us give that to the king the law gives him and no more." "I am not able," said Pym, "to speak to this question, for I know not what it is. All our petition is for the laws of England: and this power seems to be another distinct power from the power of the law. I know how to add 'sovereign' to the king's person, but not to his power; and we cannot 'leave' to him a 'sovereign power,' for we never were possessed of it." Sir Edward Coke said: "This is *magnum in parvo*. This is propounded to be a conclusion of our petition. It is a matter of great weight; and, to speak plainly, it will overthrow all our petition; it trenches to all parts of it; it flies at loans, at the oath, at imprisonment, and at billeting of soldiers; this turns all about again. Look into all petitions of former times; they never petitioned wherein there was a saving of the king's sovereignty. I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. In my opinion it weakens Magna Carta, and all the statutes; for they are absolute, without any saving of 'sovereign power'; and should we now add to it, we shall weaken the foundations of law, and then the building must needs fall. Take we heed what we yield unto: Magna Carta is such a fellow that he will have no 'sovereign.' I wonder this 'sovereign' was not in Magna Carta, or in the confirmations of it. It we grant this, by

(*a*) Parl. or Const. Hist., viii. 104.

implication we give a 'sovereign power' above all laws. Power, in law, is taken for a power with force: the sheriff shall take the power of the county; what it means here, God only knows. It is repugnant to our petition; that is, a Petition of *Right*, grounded on Acts of Parliament." In a further conference with the Lords, Sir Henry Martyn dwelt with much force upon the moderation displayed by the commons as a reason for supporting the petition in its integrity. "The moderate and temperate carriage of the House of Commons in this parliament," he said, "be it spoken without vanity, and yet in much modesty, may seem to deserve your lordships' assistance in this petition *ex congruo et condigno:* especially if you would be pleased to consider the discontents, pressures, and grievances, under which themselves, in great number, and the parts for which they serve, lamentably groaned, when they first arrived here: and which was daily represented unto them by frequent packets and advertisements out of their several counties: all which, notwithstanding, have not been able to prevail upon our moderation, or to cause our passion to overrule our discretions: and the same yet continueth in our hearts, in our hands, and in our tongues: as appeareth in the mould of this petition, wherein we pray no more but that we may be better treated hereafter. My lords, we are not ignorant in what language our predecessors were wont to express themselves upon much lighter provocation; and in what style they framed their petitions: no less amends could serve their turn than severe commissions to inquire upon the violators of their liberties: banishment of some, execution of other offenders; more liberties, new oaths of magistrates, judges, and officers, with many other provisions written in blood. Yet from us there hath been heard no angry word in this petition. No man's person is named. We say no more than what a worm trodden on would say (if he could speak), 'I pray tread on me no more.'"

The king consults the judges.

At length the lords passed the petition without any material alteration, and it awaited only the royal assent to acquire the force of law. In the meantime Charles sent for the two chief justices, Hyde and Richardson, and

submitted to them certain questions to be answered by themselves and the other judges. One was, "Whether, if the king grant the commons' petition, he doth not thereby exclude himself from committing or restraining a subject, for any time or cause whatsoever, without showing a cause?" To this the judges replied, "Every law, after it is made, hath its exposition, and so this petition and answer must have an exposition, as the case in the nature thereof shall require to stand with justice: which is to be left to the courts of justice to determine, which cannot be particularly discovered until such case shall happen. And although the petition be granted, there is no fear of conclusion as is intimated in the question" (*b*). This indirect promise of compliance on the part of the judges was apparently unsatisfactory to the king, who had no intention of really parting with the prerogative of arbitrary commitment. On June 2, 1628, he attended in the House of Lords to give his answer to the bill, before the peers and commons in parliament. To the surprise of all men, instead of the usual concise and clear form of words by which a bill receives the royal assent, Charles returned a long and equivocal answer that "the king willeth that right be done according to the laws and customs of the realm, and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppression contrary to their just rights and liberties; to the preservation whereof he holds himself in conscience as well obliged, as of his prerogative." Highly incensed at this evasive reply, which was tantamount to a refusal to pass the bill, the commons gave vent to their ill-humour by impeaching Dr. Mainwaring (*c*), and were proceeding

The king's first answer.

(*b*) Hargrave MSS. xxxii. 97, cited by Hallam, Const. Hist., i. 391.
(*c*) *Infra*, p. 632.

["The encroachments of this *jure divino* monarchy are all directed simultaneously to one practical and decisive point, the abolition of the parliamentary grant of subsidies." Gneist, Hist. Engl. Const., p. 546. "Up to this point the conflict has retained the character of former periods; administrative abuses and national grievances still continue in the grooves of the old struggles between the monarchy and parliament." *Ibid*, p. 547. Manifold have been the theories of constitutional lawyers as to what event should be regarded as the turning-point in the English constitution;—the turning-point being conceived of as a breaking with the abstract idea of monarchical infallibility in favour of the monarchical principle as a co-

to censure the favourite Buckingham, when on the joint application of the lords and commons, the king at length signified the royal assent in the customary form—"Soit droit fait come est desiré"—which gave to this second great fundamental compact between the crown and the nation the sanction of an Act of Parliament.

The royal assent given.

PETITION OF RIGHT.

3 Car. I. c. 1. (7 June, 1628.)

The Peticion exhibited to his Majestie by the Lords Spirituall and Temporall and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the Subjects: with the King's Majestie's royall aunswere thereunto in full Parliament.

To the King's most Excellent Majestie.

Illegal exactions.

I. Humbly show unto our Soveraigne Lord the King, the Lords Spirituall and Temporall, the Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the tyme of the raigne of King Edward the First, commonly called *Statutum de Tallagio non Concedendo* (*d*) that no tallage or ayde should be layd or levyed by the king or his heires in this realme, without the good will and assent of the archbishopps, bishopps, earles, barons, knights, burgesses, and other the freemen of the commonaltie of this realme; and by authoritie of Parliament holden in the five-and-twentieth yeare of the raigne of King Edward the Third (*e*), it is declared and enacted, that from thenceforth no person should be compelled to make any loanes to the king against his will, because such loanes were against reason and the franchise of the land; and by other lawes of this realme, it is provided, that none should be charged by any charge or imposicion called a benevolence, or by such like charge (*f*); by which statutes before mencioned, and other the good lawes and statutes of this realme, your subjects have inherited this freedome that they should not be compelled to contribute to any taxe, tallage, ayde, or other like charge, not sett by common consent in Parliament.

II. Yet nevertheless of late divers commissions directed to sundry commissioners in severall counties, with instruccions, have issued; by meanes whereof your people have been in divers places assembled,

ordinate factor in the government of the realm: co-ordinate, as being essentially a vital part, but a part only, of the machinery of government. This turning-point thus viewed would seem to have been reached with the Petition of Right.—Ed.]

(*d*) *Supra*, p. 241.

(*e*) See Rot. Parl., ii. 238, No. 11.

(*f*) 1 Ric. III. c. 2.

and required to lend certaine sommes of money unto your Majestie, and many of them uppon their refusall so to doe, have had an oath administered unto them not warrantable by the lawes or statutes of this realme, and have been constrayned to become bound and make appearance and give attendance before your Privie Councell, and in other places, and others of them have been therefore imprisoned, confined, and sondry other waies molested and disquieted; and divers other charges have been laid and levied upon your people in severall counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by commaund or direccion from your Majestie, or your Privie Councell, against the lawes and free customes of the realme.

Arbitrary imprisonment.

III. And where alsoe by the statute called the "Great Charter of the Liberties of England," it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customes, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peeres, or by the law of the land (*g*).

IV. And in the eight-and-twentieth yeere of the raigne of King Edward the Third, it was declared and enacted by authoritie of Parliament that no man, of what estate or condicion that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answere by due process of lawe (*h*).

V. Neverthelesse, against the tenor of the said statutes, and other the good lawes and statutes of your realme to that end provided (*i*), divers of your subjects have of late been imprisoned without any cause shewed; and when for their deliverance they were brought before your justices by your Majestie's writts of *habeas corpus*, there to undergoe and receive as the court should order, and their keepers commaunded to certifie the causes of their detayner, no cause was certified, but that they were detained by your Majesties speciall commaund, signified by the lords of your Privie Councell, and yet were returned backe to severall prisons, without being charged with anything to which they might make aunswere according to the lawe.

Billeting of soldiers and mariners.

VI. And whereas of late great companies of souldiers and mariners have been dispersed into divers counties of the realme, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourne against the lawes and customes of this realme, and to the great greivance and vexacion of the people (*k*).

(*g*) 9 Hen. III. c. 29; *supra*, pp. 113, 114.

(*h*) 28 Edw. III. c. 3.

(*i*) See 37 Edw. III. c. 18; 38 Edw. III. c. 9; 42 Edw. III. c. 3; 17 Ric. II. c. 6.

(*k*) By stat. 31 Car. II. c. 1 it is enacted that no officer, military or civil, or other persons, shall quarter or billet any soldier upon any inhabitant of this realm without his consent, and that every such inhabitant may refuse to quarter any soldier, notwithstanding any order whatsoever. The pro-

VII. And whereas alsoe by authoritie of Parliament, in the five-and-twentieth yeare of the raigne of King Edward the Third, it is declared and enacted that no man shall be forejudged of life or limbe against the forme of the Great Charter and the lawe of the land; and by the said Great Charter and other the lawes and statutes of this your realme, no man ought to be adjudged to death, but by the lawes established in this your realme, either by the customes of the same realme or by Acts of Parliament; and whereas no offender, of that kinde soever, is exempted from the proceedings to be used, and punishments to be inflicted by the lawes and statutes of this your realme: nevertheless of late tyme divers commissions under your Majestie's Great Seale have issued forth, by which certaine persons have been assigned and appointed commissioners with power and authoritie to proceed within the land, according to the justice of martiall lawe, against such souldiers or marriners, or other dissolute persons joyning with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martiall lawe, and as is used in armies in tyme of warr, to proceed to the tryall and condemnacion of such offenders, and them to cause to be executed and putt to death according to the lawe martiall. *Martial Law.*

By pretext whereof some of your Majestie's subjects have been by some of the commissioners put to death, when and where, if by the lawes and statutes of the land they had deserved death, by the same lawes and statutes alsoe they might, and by no other ought, to have byn judged and executed.

And also sundrie greivous offenders, by colour thereof clayming an exempcion, have escaped the punishments due to them by the lawes and statutes of this your realme, by reason that divers of your officers and ministers of justice have unjustlie refused or forborne to proceed against such offendors according to the same lawes and statutes, uppon pretence of that the said offendors were punishable onelie by martiall law, and by authoritie of such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directlie contrary to the said lawes and statutes of this your realme.

VIII. They doe therefore humblie pray your most excellent Majestie that no man hereafter be compelled to make or yeild any guift, loane, benevolence, taxe, or such like charge, without common consent by Acte of Parliament; and that none be called to make aunswere or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusall thereof; and that no freeman, in any such manner as is before mencioned, be imprisoned or deteined; and that your Majestie *Remedies prayed for;*

visions of the Petition of Right and of this statute of Charles II. against billeting are annually suspended by the Mutiny Act, which expressly gives permission to billet soldiers in inns and victualling houses.

would be pleased to remove the said souldiers and marriners, and that your people may not be soe burthened in tyme to come; and that the aforesaid commissions, for proceeding by martiall lawe, may be revoked and annulled: and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majestie's subjects be destroyed or put to death contrary to the lawes and franchise of the land.

as their rights and liberties according to the laws and statutes.

All which they most humblie pray of your most excellent Majestie as their rights and liberties, according to the lawes and statutes of this realm; and that your Majestie would alsoe vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or example; and that your Majestie would be alsoe graciouslie pleased, for the further comfort and safetie of your people, to declare your royall will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the lawes and statutes of this realme, as they tender the honor of your Majestie, and the prosperitie of this kingdome.

Quæ quidem peticione lectâ et plenius intellectâ per dictum dominum regem taliter est responsum in pleno parliamento, videlicet, Soit droit fait come est desiré (*l*).

Subsidies granted.

Tonnage and poundage.

The commons were triumphant, and grateful amidst their rejoicings. They immediately passed a bill granting the five subsidies already promised; and were preparing another giving the king tonnage and poundage for life, but delayed its passing in order to remonstrate against the continued illegal levying of those duties without the sanction of parliament, and to pray for the removal from office of Buckingham, to whose evil influence they attributed all the misfortunes of the kingdom both at home and abroad. To prevent the delivery of this remonstrance, the king suddenly (June 26) prorogued parliament.

On January 20, 1628-9, the two Houses reassembled. During the recess the assassination of Buckingham by Felton (August 23) had removed one great cause of contention between Charles and his people; but the king had continued, in violation of the Petition of Right (*m*), to raise

(*l*) Statutes of the Realm, V. 23, 24.

(*m*) The customs duties were not mentioned by name in the Petition of Right, but it might fairly be contended that they were included in the words "taxe or such like charge" which that statute had declared that no man should be compelled to pay without common consent by Act of Parliament.

the customs duties as before, and several merchants, on refusal to pay, had been punished by distraint of their goods and imprisonment. On appealing to the courts of law, they were informed by the judges that the king's right was conclusively established by the decision in *Bates's case*.

Copies of Petition of Right circulated with king's first answer annexed.

The natural irritation of the commons was increased on hearing that the speech in which Charles, at the close of the last session, had claimed tonnage and poundage as his due, had been entered on the parliament roll together with the Petition of Right, and that he had caused 1,500 copies of the great constitutional compact between the crown and the people to be circulated throughout the country with his first and repudiated answer annexed, in addition to the final answer which alone formed part of the statute (*n*). Selden at once complained to the House of the breach (as he alleged) of the Petition of Right in the case of the merchants whose goods had been seized, and also of the cutting off of a man's ears by an arbitrary judgment of the Star Chamber. "Next," he said, "they will take away our arms, and then our legs, and so our lives: let us all see we are sensible of this. Customs creep on us; let us make a just representation hereof unto his Majesty." The dispute as to tonnage and poundage was embittered and complicated by the fact that Henry Rolle, one of the merchants whose goods had been seized, was a member of the House. At this period, privilege of parliament was held to protect not only the persons but the goods of members from arrest; and although, owing to the time (the middle of the parliamentary recess) when the seizure in Rolle's case had been effected, it could only be brought technically within the privilege by means of a legal fiction, the commons were disposed to resent the matter as an attack on their liberties; and while one member, Phelips, moved for a committee on

Question of privilege: *Rolle's case*.

The word "tax" had actually been employed officially to include customs duties. (See Edinburgh Review, Jan. 1876.) In the remonstrance which the commons were prevented from delivering by the prorogation, they had declared that the levying of tonnage and poundage without consent was illegal by the Petition of Right. Charles, however, relied on the decision of the judges in *Bates's case* (*supra*, p. 483), and the legal question was certainly not free from doubt.

(*n*) State Papers [Dom. 1628-1629, p. 456], cxxxiii. 4; S. R. Gardiner, Pers. Gov. of Ch. I., i. 46. [*Cf.* S. R. Gardiner, Const. Documents of the Puritan Revolution, p. 22.—Ed.]

the whole question of the levy of tonnage and poundage, another, Littleton, desired that "the parties be sent for that had violated the liberties" (*o*). The king now thought it prudent to attempt to allay the rising storm. Sending for the two Houses to Whitehall, he explicitly renounced all claim to levy tonnage and poundage as of right. "It ever was, and still is my mending," he told them, "by the gift of my people to enjoy it, and my intention in my speech at the end of the last session was not to challenge tonnage and poundage of right, but for expedience *de bene esse*, shewing you the necessity, not the right, by which I was to take it until you had granted it unto me; assuring myself, according to your general profession, that you wanted time and not good will to give it me" (*p*). This politic speech made a most favourable impression, and two days afterwards a proposal was made by Sir John Coke to bring in a bill granting tonnage and poundage to the king; but there still remained a grievance which the commons had even more at heart than illegal taxation, and the latter question was postponed until the recent innovations in religion had been discussed.

Charles renounces the right to levy tonnage and poundage.

Position of the commons in politics and religion.

The position taken up by the commons alike in politics and religion was a conservative one. In politics, they sought to preserve the free English constitution as it had existed prior to the despotic practices of the Tudors and the despotic theories as well as practices of the Stuarts. In religion they adhered to the narrow calvinistic theology which had been prominent in the national church from the reformation to the beginning of the seventeenth century. This they regarded as the orthodox doctrine, and considered it to be supported by the Prayer Book, the Catechism, the Homilies, the writings of Bishop Jewel, the Lambeth Articles of 1595, the Resolutions of the Synod of Dort in 1618, the uniform consent of writers whose works had been published by authority, and by the submission enjoined by the two universities upon the opponents of the Lambeth Articles. They complained of the spread of popery and arminianism; the removal of communion-tables to be set up

(*o*) Gardiner, Pers. Gov. of Ch. I., i. 47, 48.

(*p*) Contarini's Despatch, Venetian MSS., cited by Gardiner, Pers. Gov. of Ch. I., i. 50.

as altars at the eastern end of churches; the placing of candlesticks on them; and the obeisance made towards them; the ordering that congregations should stand up at the singing of the Gloria Patri, and that women coming to be churched should wear veils; the setting up of pictures and lights and images in churches, praying towards the east, crossing and other devout but to them objectionable gestures (*q*).

Position taken by the king and Laud in the religious controversy.

In December, 1628, at Laud's suggestion, the king had endeavoured to silence all religious controversy by issuing a new edition of the Articles of Religion, prefaced by a declaration (which is still printed in the Book of Common Prayer) directing that thereafter no man should either in writing or preaching put his own sense or comment as the meaning of the Articles, but should take them in their literal and grammatical sense. He at the same time inferentially repudiated the right of parliament to deal with religious questions, by declaring that to the king, as supreme governor of the church, and to the Convocation, acting by his leave and with his approval, such matters exclusively belonged. But while professing to act impartially, the king's sympathies were unmistakably shown not only by his close alliance with Laud, but his ostentatious bestowal of promotion upon those of the clergy who had rendered themselves notorious, and incurred the animosity of the House of Commons, by their simultaneous advocacy of anti-calvinistic doctrines in the church and of the divine right of kings in the state. Dr. Montague, whose *Appello Caesarem* in 1625 had been condemned by the commons as containing matters contrary to the Thirty-nine Articles, and who in 1627 had been foremost in inculcating the duty of paying the forced loan, was promoted by the king to a bishopric shortly after the prorogation of parliament in 1628; and at the same time Dr. Mainwaring, who had but recently been impeached by the commons and condemned by the lords for his advocacy, in the pulpit and the press, of the right of the king to tax his subjects without the consent of parliament (*r*), was rewarded with a rich living, and ultimately advanced to the bishopric of St. David's. The

(*q*) Parl. or Const. Hist., iii. 483; Gardiner, Pers. Gov. of Ch. I., i. 87.
(*r*) *Infra*, p. 632.

Toleration unthought of.

idea of toleration and religious liberty was as yet unthought of by either king or parliament, and the commons, having declared their interpretation of the Articles of Religion to be the only true one, proceeded to summon the authors of the ceremonial innovations to answer at the bar of the House.

Question of tonnage and poundage resumed.

In the meantime the question of tonnage and poundage was again taken up, and, contrary to the advice of Pym, who wished the matter to be dealt with on the broad national basis of the illegality of taxation without consent, the commons resolved to give prominence to the breach of privilege in *Rolle's case*, and accordingly summoned the custom-house officers who had seized that member's goods to appear and answer for their contempt. The king refused to allow his officers to be questioned for obedience to his orders, and directed the House to adjourn for a few days until March 2 (*s*). During the short recess attempts were made to come to some private arrangement with the leaders of the commons, but these failing, the House, at its re-assembling on March 2, was informed by the Speaker, Sir John Finch, that the king again required them to adjourn, this time to the 10th. The right of the king to order an adjournment, which had always been admitted by the lords in reference to their own House, had never been acquiesced in by the commons, who, while complying with the king's wishes, had always been careful to make their adjournment their own formal act. When the question of adjournment was now put by the Speaker a chorus of "Noes" resounded from every side. Sir John Eliot, who, anticipating the adjournment and speedy dissolution of parliament by the king, had prepared a protestation on the subjects of religion and taxation, which, if only passed by the House before its adjournment, would go forth to the country as an appeal against the king's arbitrary proceedings, rose to speak. He was interrupted by the Speaker, who, saying he had the absolute command of the king to leave the chair if any one should attempt to address the House, rose also, but was at once thrust back into his seat by Holles and Valentine. The whole House was now in an uproar. Some of the privy

The commons refuse to adjourn.

(*s*) Gardiner, Pers. Gov. of Ch. I., i. 89.

councillors present rushed to the assistance of the Speaker, who broke away for a moment, but only to be again seized and forced into the chair. "God's wounds," exclaimed Holles, "you shall sit till we please to rise." At the order of the House the door was locked by Sir Miles Hobart, who placed the key in his pocket. Eliot proposed that three resolutions, the substance of which he explained, should be formally put to the vote. Both the Speaker and the clerk refused. A confused and stormy debate ensued, and Eliot, despairing of getting the resolutions passed, had thrown them into the fire, when, just as the king's guard was approaching the House to effect a forcible entry, Holles, who had hastily rewritten the resolutions from memory, read them to the House. They were carried by acclamation, and, the House having voted its own adjournment, the door was thrown open (*t*).

The three resolutions declared: (1) that the introducers of innovation in religion, or of popery, or arminianism, or other opinions disagreeing from the true and orthodox church; and (2) all who should counsel or advise the taking and levying of the subsidies of tonnage and poundage, not being granted by Parliament, or should be actors or instruments therein, should be reputed capital enemies to the kingdom and commonwealth; and (3) that all merchants or others who should voluntarily pay the said subsidies, should be reputed betrayers of the liberties of England, and enemies to the same. The three resolutions.

The House at its rising had adjourned to March 10. On that day the king dissolved parliament in person, with an angry reference to the "disobedient carriage of the Lower House," and a threat that "the vipers amongst them should meet with their reward" (*u*).

(*t*) Nicholas' Notes of the Session of 1629; State Papers, Dom. [1628-1629, p. 485], cxxxviii. 5, 6, 7.

(*u*) Parl. or Const. Hist., viii. 333.

CHAPTER XIV.

THE STUART PERIOD.

II. FROM THE PETITION OF RIGHT TO THE RESTORATION. (1629—1660.)

Charles I. determined to govern without a parliament.

On the dissolution of his third parliament, Charles I. appears to have come to a settled determination to overthrow the old parliamentary constitution of England by governing, for the future, without the intervention of the national council, so long as that council should presume to claim an independent, and, as the representative of the collective nation in opposition to the individual king, a preponderating voice in the government of the state. In an arrogant proclamation, referring to certain false rumours that he was about again to call a parliament, he announced that "the late abuse having for the present driven him unwillingly out of that course, he should account it presumption for any to prescribe any time unto him for parliaments, the calling, continuing, and dissolving of which was always in his own power. He should be more inclinable to meet a parliament again when his people should see more clearly into his intents and actions, and when such as had bred this interruption should have received their condign punishment." Even before the actual dissolution, the king had hastened to take vengeance on the opposition "vipers." Sir John Eliot, Selden, Holles, Long, Valentine, Strode, and other eminent members of the commons, were summoned before the council and committed to prison. Against Eliot, Holles, and Valentine an information was filed in the King's Bench. On suing out their writ of habeas corpus they were by the king's order removed to the Tower, so as to elude the judgment of the court. On being required to plead to the

Imprisonment of members.

information, they demurred to the jurisdiction of the court on the ground that as their alleged offences had been committed in parliament, they were not punishable in any other place. This demurrer, which raised the great question of parliamentary privilege, was overruled; and as the defendants persisted in their refusal to plead, judgment was given that they should be imprisoned during the king's pleasure, and not released until each had given surety for good behaviour and had made submission. In addition, Eliot, as the ringleader, was fined £2,000, Holles £1,000, and Valentine £500 (*a*). Other distinguished leaders of the opposition had been brought over to the king's side by the gift of office. Sir Dudley Digges was made master of the rolls; Noy, attorney-general; and Littleton, solicitor-general: Wentworth, created first a baron, then a viscount, and subsequently Earl of Strafford, was made president of the Council of the North, and afterwards lord deputy of Ireland.

Eleven years of despotic government. [1629-40.]

Surrounded by these new counsellors, and guided chiefly by the advice of Laud and Wentworth, Charles now entered upon a career of despotism which he maintained for eleven years. This period of personal government, during which the king governed without the parliament, was, constitutionally speaking, as much a revolutionary period as that during which, later on, parliament governed without the king. It should always be borne in mind that it was the aggression of Charles which provoked the counter-aggression of the parliament.

Expedients to raise a revenue.

To raise a revenue, Charles had recourse to various exactions, many of which were clearly illegal, and nearly all odious and vexatious. "Obsolete laws," says Clarendon, "were revived and rigorously executed," and "unjust projects of all kinds, many ridiculous, many scandalous, all very grievous, were set on foot." Tonnage and poundage and other duties were rigorously enforced by the royal authority alone. Monopolies, abolished by Act of Parliament in the last reign, were re-established and applied to

(*a*) [Eliot died in prison some years afterwards (Nov. 27, 1632), universally regarded as a martyr in the cause of liberty. (See *supra*, p. 304; Forster's Life of Sir John Eliot; and Gneist, Hist. Engl. Const., p. 533, and note.)—Ed.]

almost every article of ordinary consumption. The ancient prerogative of compelling tenants in chivalry to receive the order of knighthood or pay a fine was revived, and extended to all men of full age seised of lands or rents (by whatever tenure) of the annual value of £40 or more. "By this expedient," says Clarendon, "which, though it had a foundation in right, yet in the circumstances of proceeding was very grievous, the king received a vast sum of money from persons of quality, or of any reasonable condition, throughout the kingdom" (*b*). Commissioners were appointed to search out and compound for defects in titles to estates; and an attempt was even made to revive the ancient and odious forest laws. Under cover of the rule of law that no length of prescription could be pleaded in bar of the king's title, the boundaries of the royal forests were so extended that the forest of Rockingham alone was increased from six to sixty miles in circuit at the expense of the neighbouring landowners, who, at the same time, were mulcted in enormous fines for alleged encroachments, some of which were from three to four hundred years' standing (*c*). "This burthen," says Clarendon, "lighted most upon people of quality and honour, who thought themselves above ordinary oppression, and were like to remember it with more sharpness" (*d*).

Royal proclamations.

In lieu of Acts of Parliament, royal proclamations, more numerous and oppressive than those which had excited so much opposition under James I., were issued from time to time and declared to have the force of laws.

Servility of the judges.

The common law judges, with a few honourable exceptions, upheld by their decisions the illegal acts of the king; whilst the irregular tribunals, the courts of Star Chamber and High Commission, by extending their authority and exercising a vigilant and severe coercive jurisdiction whenever the slightest opposition was manifested against the civil tyranny of the king or the ecclesiastical tyranny of Laud, main-

(*b*) Hist. Rebellion, i. 67.

(*c*) On this ground Lord Salisbury was fined £20,000; Lord Westmoreland, £19,000; Sir Christopher Hatton, £12,000; Sir Lewis Watson, £4,000; and many other persons in smaller amounts.—Strafford's Letters, ii. 117. Cobbett's Parl. Hist., ii. 642.

(*d*) Clarendon, Hist., i. 16.

tained for some years what may not unfairly be designated as a reign of terror.

Punishments inflicted by the Star Chamber.

Of the barbarous and tyrannical punishments inflicted by the court of Star Chamber it will be sufficient to refer to a few only of the more celebrated instances (*e*). (1) John Williams, Bishop of Lincoln, who, as a favourer of the puritans, had excited the enmity of Laud, had received certain letters from Dr. Osbaldiston, the master of Westminster School, wherein some contemptuous nickname was applied to the archbishop. For concealing (not publishing) this libellous letter, Williams was condemned, in 1637, to pay £5,000 to the king, and £3,000 to Laud, and to be imprisoned during pleasure. A few days afterwards he was suspended from his office by the High Commission Court. Osbaldiston was adjudged to pay a still heavier fine, to be deprived of his benefices, and to be imprisoned until he should make submission. In addition he was to stand in the pillory with his ears nailed to it, in front of his school in Dean's Yard (*f*). (2) Alexander Leighton, a Scottish divine (whose son afterwards became Archbishop of Glasgow), was sentenced in 1630, for writing an able but scurrilous book entitled "An appeal to parliament, or Sion's plea against prelacy," to pay a fine of £10,000, to be degraded from orders, to be whipped at Westminster and set in the pillory, to have one ear cut off, one side of his nose slit, and one cheek branded with S.S. (for "sower of sedition"), to have the whole of this repeated the next week at Cheapside, and to suffer imprisonment for life (*g*). (3) In

(*e*) ["Only sentences of death and confiscations were reserved to the ordinary courts of justice"; Gneist, Hist. Eng. Const., p. 553, note. Short of this, the Star Chamber by its penal decrees exercised a practically unlimited jurisdiction. *Cf.* Rushworth, ii. 219.—Ed.]

(*f*) Osbaldiston managed to keep out of the way, but the bishop was imprisoned until released with other political prisoners, in 1640.

(*g*) State Tr., iii. 383. "Sion's Plea" had been elaborated by Leighton out of a petition drawn up by him after the prorogation in 1628, for presentation to parliament at its next meeting, and to which he obtained five hundred signatures, including those of several members of the House of Commons. It assailed the bishops in unmeasured terms. They had promised the late king "absolute liberty to do what he list," if he would only support their authority. This was not so very far from the truth. But Leighton weakened his case against them as supporters of a regal autocracy by laying to their charge almost every evil which existed in the world; denouncing them as "men of blood," persecuting the saints,

1638, for distributing pamphlets against the bishops, John Lilburne, a London apprentice (who afterwards fought with great bravery in the parliamentary army, and attained the rank of lieutenant-colonel), was severely whipped from the Fleet to Westminster, set in the pillory, and kept in prison until released three years afterwards by the Long Parliament. (4) But the case which excited the greatest popular indignation was that of Prynne, Burton, and Bastwick, who were together brought before the Star Chamber in 1637. William Prynne, a barrister of Lincoln's Inn, of great learning, but a bigoted puritan, had already suffered, in 1633, for publishing a ponderous tome of 1,000 pages, entitled "Histriomastix," condemning stage-plays, may-games, and similar diversions. Unfortunately for Prynne, the queen, about ten weeks after the printing of this book had been completed, took part in a masque at court. A passage reflecting in the strongest terms on female actors was now, unfairly as he contended, alleged to be an intentional insult to her Majesty (*h*); and Prynne was condemned to stand twice in the pillory, to lose both ears, to pay a fine of £5,000, to be degraded from the bar and at his university (Oxford), and to be imprisoned until he should make entire submission. While in prison he managed to elude the prohibition of pen, ink, and paper, and published some fresh works in defence of his principles, which caused him to be now again brought before the Star Chamber. The offence of Henry Burton, a London rector, was the publication of two sermons, and also a pamphlet entitled "News from Ipswich," containing charges of Romish innovations against Wren, Bishop of Norwich. John Bastwick, a physician of Colchester, and formerly of

"knobs and wens of bunchy popish flesh," the "trumpery of Antichrist." The "Plea" was something more, however, than a mere attack upon the bishops. It was an appeal to political presbyterianism, more especially as represented in the two Houses of Parliament, to remove the evil counsellors of the king, and to resist a dissolution.

(*h*) Prynne denied any reference to the queen, and argued that she could not have been aimed at in a publication the last proof-sheets of which had been corrected ten weeks before she acted in the court masque. But it appears by the newsletters of Salvetti, the Florentine agent, that the intention of the queen to act was known about the time Prynne was completing his proof, and the offending passage appears on the last page of the book then under revision. See Gardiner, Pers. Gov. of Ch. I., ii. 36.

Emmanuel College, Cambridge, was already, like Prynne, undergoing punishment for a former offence. Some years previously he had published a Latin work, called "Elenchus Papismi et Flagellum Episcoporum," in answer to a book written by one Short, a papist, in support of his religion. For this he was sentenced by the High Commission Court to a fine of £1,000, to be debarred his practice of physic, to be excommunicated, and imprisoned until he should make recantation. While in gaol he published a defence of himself and an acrimonious attack upon his prosecutors, and for this publication he was summoned, at the same time as Prynne and Burton, before the Star Chamber. It was at first intended to proceed against the three for high treason, but the judges, on being consulted, had the courage to declare that their libels against the bishops did not amount to treason. The accused were all fined £5,000 each, condemned to the pillory, to lose their ears, to be branded on both cheeks, and to be imprisoned for life, without access to kindred or friends, and without books or writing materials. The sentence was executed in the most savage manner: the stumps of Prynne's ears, which had been mercifully spared by the hangman on the former occasion, being now pared off so closely as to endanger his life. So great was the sympathy expressed for them in London, and even in some country districts, that the council deemed it prudent to send Prynne to Jersey, Burton to Guernsey, and Bastwick to Scilly, where they remained in close confinement until released by order of the Long Parliament (*i*).

Case of Ship-money.

Shortly before these proceedings against Prynne, a decision had been pronounced by the Exchequer Chamber, in the famous case of ship-money (*k*), by which the whole property of the English people was placed at the disposal of the crown.

The idea of ship-money originated in the "venal diligence and prostituted learning" of Sir William Noy, the

(*i*) Brodie, Hist. Brit. Empire, ii. 334. Several other instances of the merciless punishments inflicted by the Star Chamber are enumerated in the 4th chapter of Mr. Brodie's 2nd vol.

(*k*) [See, for the history of ship-money, Rushworth, ii. pp. 335, 480-605, and Hallam, ii. c. 8.—Ed.]

attorney-general. Among the records in the Tower he had found ancient writs compelling the seaports and even maritime counties to provide ships for the use of the king; and upon these precedents he devised a plan by which a large fleet might be procured without any additional charge upon the revenue. In October, 1634, writs were issued to the magistrates of London and other ports ordering them to provide a certain number of ships of war of a specified tonnage and equipage, to be ready at Portsmouth on March 1, and empowering them to assess all the inhabitants, according to their substance, for the sum requisite for the fitting out and maintenance of the ships and their crews for the period of six months (*l*).

First writ of ship-money, Oct. 24, 1634.

Notwithstanding the remonstrances of London, and some other towns, obedience to these "new writs of an old edition" was enforced by the imprisonment of such persons as refused to pay their share of the assessment, and the experiment proved a great temporary success. "In this way," wrote the Venetian ambassador to his government, "did this most important affair begin and end. If it does not altogether violate the laws of the realm, as some think it does, it is certainly repugnant to usage and to the forms hitherto observed" (*m*). In effect, the levying of ship-money was the imposition of a "tax"; for the ships specified in the writs were of such a size as to render it impossible for any port in the kingdom (except London) to furnish them in kind as formerly, and the demand resolved itself into a demand for so much money. It was, therefore, in its essence, a distinct violation of the Petition of Right, notwithstanding the show of precedent in its favour. We now know that the fleet was being prepared in furtherance of a secret treaty which Charles had been negotiating, the ultimate object of which was the overthrow of the Dutch Republic and the division of its soil between Spain and England (*n*). But there was also a real foundation for the pretext for arming with which the king endeavoured to hoodwink the nation, and even his own council, in the evident necessity at the time for a powerful fleet to repress

(*l*) Rushworth, ii. 257.
(*m*) *Ibid.* ii. 290.
(*n*) Clarendon, State Papers, i. 109, 112, 126.

as well the depredations of the Algerine pirates, who had become bold enough to infest the coasts both of England and Ireland, as the boldness of the Dutch, who had taken advantage of the naval weakness of England to dispute the ancient claim of the English crown to the dominion of the narrow seas (*o*).

Noy died soon after suggesting the expedient of ship-money, but the Lord Keeper Finch improved upon the original scheme by advising an extension of the writs from the seaports to the whole kingdom. Clarendon admits that this tax was intended not merely for the support of the navy, but "for a spring and magazine that should have no bottom, and for an everlasting supply of *all* occasions" (*p*). Writs were accordingly sent to the sheriff of every county in England and Wales ordering him to provide a ship of war of a prescribed tonnage, armed and equipped for the king's service: but as it was never intended that an actual ship should be provided, instructions were sent with each writ commanding the sheriff, instead of a ship, to levy upon his county a specified sum of money, and return the same to the treasurer of the navy for his Majesty's use, with directions to enforce payment by compulsory process. The collection of the money met with a good deal of resistance in the country. The chief-constables of the hundred of Bloxham, Oxfordshire, replied to the warrant from the sheriff of the county directing the assessment, that they had "no authority to assess or tax any man," and that they did not conceive the warrant gave them any power to do so. Ultimately, the sheriff was obliged to make the assessment himself. Similar difficulties occurred also in Essex and Devonshire. In some places the incumbents, church-

Second writ of ship-money, Aug. 4, 1635.

Resistance to the collection.

(*o*) It was to uphold these claims of the Dutch that Grotius wrote his celebrated "Mare Liberum" (1609), and [his views were repeated in his more] famous work on international law, ["De Jure belli et pacis"] (1625). [These contentions] were answered by Selden in the "Mare Clausum" (1635), proving that sovereignty over the narrow seas had been exercised by England from the earliest times. [The controversy was ended by Bynkershoek, in his defence of the complete freedom of the seas, "De dominio maris" (1702), who, however, acknowledged, on the other hand, that the sovereignty of maritime states extended only to the so-called coast waters, the range of cannon-shot—"quousque tormenta exploduntur"; "terræ dominium finitur, ubi finitur armorum vis."—Ed.]

(*p*) Hist., i. 68.

wardens and overseers utterly refused to produce their books. When cattle were distrained in default of payment no purchasers could be found, and the council found it necessary to direct them to be sent to London for sale by the king's officers (*q*).

Richard Chambers, a London merchant, who had already suffered for his resistance to the imposition of tonnage and poundage, brought an action in the King's Bench against the Lord Mayor for imprisoning him on refusal to pay the assessment. The defendant pleaded the king's writ as a special justification, and the judges refused even to allow the question of right to be argued, Berkeley, one of their number, declaring that "there was a rule of law and a rule of government, and that many things which might not be done by the rule of law might be done by the rule of government" (*r*).

Third writ of ship-money, Oct. 9, 1636.

The issuing of a third writ of ship-money, affecting, like its immediate predecessor, the whole of England, made it but too clear that it was the king's intention to retain this innovation as a permanent tax, to be levied at his pleasure without the consent of the nation. The opposition to the writs, hitherto restricted to particular localities, now assumed a general aspect, and was taken up by men of the highest rank and of undoubted loyalty. The Earl of Danby (Henry Danvers), an old servant of the crown, wrote to the king, warning him of the universal discontent of his subjects. The new levies of money, he said, were repugnant to the fundamental laws of England, and to the privileges which their ancestors and they themselves had till the present time enjoyed. It was of the manner in which the money was raised, not of the amount, that they complained. The only way for the king to give satisfaction to his subjects was by summoning parliament (*s*). The Earl of Warwick (Robert Rich) addressed him in much plainer language, and several peers drew up a protestation to the king, which, however, does not appear to have been actually presented (*t*). But Charles had no intention either

(*q*) Gardiner, Pers. Gov. of Ch. I., ii. 190, 191, 201, 202.
(*r*) Rushworth, ii. 323.
(*s*) Gardiner, Pers. Gov., ii. 315.
(*t*) Gardiner, Pers. Gov., ii. 316.

of calling a parliament or of desisting from the exaction of the obnoxious tax, which produced an annual revenue of over £200,000. The people murmured, but were obliged to yield to the overbearing power of the crown. Several attempts were made to raise the question of the legality of the levy in the courts of law, but the crown always found means to elude the discussion. At length, in 1637, John Hampden, a gentleman of ancient family and good estate in Buckinghamshire, succeeded in obtaining a judicial decision upon the point of law. Having refused to pay the sum of 20s. assessed upon a portion of his estate (*u*), proceedings were instituted against him in the Exchequer, to which he appeared and demurred to the writ as insufficient in law. "Till this time," says Clarendon, "he was rather of reputation in his own country than of public discourse of fame in the kingdom: but then he grew the argument of all tongues, every man inquiring who and what he was that durst, on his own charge, support the liberty and prosperity of the kingdom" (*w*). The king awaited the decision of the judges with confidence. Some time previously he had privately submitted to them the following questions: (1) "When the good and safety of the kingdom in general is concerned and the whole kingdom is in danger; whether may not the king, by writ under the Great Seal of England, command all the subjects of his kingdom, at their charge, to provide and furnish such number of ships, with men, victuals, and munitions, and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof in case of refusal or refractoriness? (2) And whether, in such case, is not the

Hampden's refusal to pay.

Extra-judicial opinions of the judges, Feb. 7, 1637.

(*u*) The sum of 20s. was assessed on lands in Great Missenden, and another sum of 31s. 6d. on his lands in Great Kimble.

(*w*) Hampden, who was a cousin of Oliver Cromwell, had sat in Charles's first three parliaments. For refusing to contribute to the general loan in 1626, on the ground that "he feared to draw upon himself that curse in Magna Carta which should be read twice a year against those that do infringe it," he was committed to prison, but regained his freedom in time to be re-elected to the parliament of 1628. In the Long Parliament he sat for Buckinghamshire, and on the breaking out of the Civil War, took a colonel's commission in the parliamentary army. He died June 24, 1643, of wounds received in a skirmish at Chalgrove, near Oxford, six days previously.

king sole judge, both of the danger, and when and how the same is to be prevented and avoided ?" The judges (with the exception of Croke and Hutton, who, however, subscribed their names on the principle that the judgment of the majority was that of the whole body) answered both questions in favour of the prerogative, and this extra-judicial opinion was by the king's order publicly read in the Star Chamber, and enrolled in all the courts at Westminster (*x*).

Arguments on the case

During twelve days the great case was argued in the Exchequer Chamber, by the celebrated Oliver St. John and Mr. Holborne as counsel for Hampden, by the attorney-general Bankes and the solicitor-general Littleton on behalf of the crown. On the part of Hampden it was maintained:

(1) That the law and constitution of England had provided certain known and undoubted means for the defence of the realm whether by sea or land. (a) The military tenures of land bound a large part of the kingdom to a stipulated service at the charge of the holders. The Cinque Ports also, and some other towns held by an analogous tenure, were bound to furnish a quota of ships or men in return for the special privileges which they enjoyed. (b) In addition to these services in kind for defence by land and sea, things coming to the king by prerogative, as the profits arising from the feudal tenures, and various other emoluments received in right of the crown, were applicable so far as they would extend to the public use. (c) The king, moreover, had been specially provided with particular supplies of money for defence of the sea in time of danger, as the customs on wool and leather, tonnage

(*x*) The opinion of the judges was twice taken by the king; first, in Dec. 1635, shortly after the issue of the second writ, and again more formally in Feb. 1637. Their answers were practically the same on both occasions. On their last opinion Strafford wrote: "Since it is lawful for the king to impose a tax towards the equipment of the navy, it must be equally so for the levy of an army; and the same reason which authorises him to levy an army to resist will authorise him to carry that army abroad, that he may prevent invasion. Moreover, what is law in England is law also in Scotland and Ireland. *This decision of the judges will therefore make the king absolute at home* and formidable abroad. Let him only abstain from war a few years, that he may habituate his subjects to the payment of this tax, and in the end he will find himself more powerful and respected than any of his predecessors."—Strafford Papers, ii. 61.

and poundage. With regard to the legality of the modern impositions, far in excess of the ancient use, Mr. St. John said he did not intend to speak: "for in case his Majesty may impose upon merchandise what himself pleaseth, there will be less cause to tax the inland counties; and in case he cannot do it, it will be strongly presumed that he can much less tax them."

(2) When these ordinary revenues proved insufficient, the constitution had provided other sufficient and lawful means—viz., aids and subsidies granted in parliament. To these the kings of England had at all times habitually had recourse. "For as," said St. John, "without the assistance of his judges, his Majesty applies not his laws, so neither without the assistance of his great council in parliament can he impose. The fact that our kings also obtained supplies of money by loans on promise of repayment, or by benevolences which were in the nature of alms from their subjects, afforded additional proof that they possessed no prerogative of general taxation. It is rare in a subject, and more so in a prince, to ask and take that as a gift which he may and ought to have of right.

(3) But the most conclusive and irrefutable argument was founded on the long series of statutes, concluding with the recently granted Petition of Right, by which, in most emphatic language, it was provided that no tax should be levied on the subject without the consent of parliament.

(4) As to the precedents alleged on the crown side, it was answered that most or all of them applied to sea-towns and havens; and that it appeared that the inland counties had not so much as *de facto* been usually charged for ships. But even if precedents could be adduced, they could not be upheld in the teeth of so many statutes. The question was not what had been done *de facto*, for many things had been done which were never allowed, but what had been done, and might be done *de jure*. "Judicandum est legibus non exemplis."

(5) Lastly, admitting that in a case of overruling necessity, as of actual invasion, or its immediate prospect, not only the sovereign, but each man in respect of his neighbour, might do many things absolutely illegal at other seasons, yet in the present case there was no over-

whelming danger; the nation was at peace with all the world; and it would be absurd to reckon the piracies of a few Turkish corsairs among those instant perils for which a parliament would provide too late.

Judgment for the crown.

The twelve judges took some time for deliberation, and delivered their judgments during the three next terms, four in each term. Seven pronounced in favour of the crown, and five in favour of Hampden; so that the majority against him was the least possible. Of the five who decided for Hampden, three based their judgments upon merely technical grounds peculiar to his particular case; but the other two, Croke and Hutton, boldly denied the right claimed by the crown, without the smallest qualification. The elaborate and learned judgment of Sir George Croke was grounded upon the following reasons: First, that the command by the king's writ to have ships at the charge of the inhabitants of the county was illegal and contrary to the common law, not being by authority of parliament. Secondly, that if at the common law it had been lawful, yet this writ was illegal, being expressly contrary to divers statutes prohibiting a general charge to be laid upon the commons without the consent in parliament. Thirdly, that it was not to be maintained by any prerogative, nor allegation of necessity or danger. Fourthly, admitting it were legal to lay such a charge upon maritime ports, yet to charge any inland county, as the county of Bucks, for making ships, and furnishing them with mariners, &c., was illegal and not warranted by any precedent. On the other hand several of the judges who pronounced for the crown, finding it almost impossible to elude the force of the numerous prohibitory statutes, rested their decision upon the intrinsic absolute authority of the king, and the inability of parliament to limit the high prerogative of the crown. Mr. Justice Crawley said: "This imposition without parliament appertains to the king originally, and to the successor *ipso facto*, if he be a sovereign in right of his sovereignty from the crown. You cannot have a king without these royal rights." "Where Mr. Holborne," said Mr. Justice Berkeley, "supposed a fundamental policy in the creation of the frame of this kingdom, that, in case the monarch of England should be

inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them, but upon a common consent in parliament; he is utterly mistaken therein. The law knows no such king-yoking policy. The law is itself an old and trusty servant of the king's; it is his instrument or means which he useth to govern his people by: I never read nor heard that lex was rex: but it is common and most true that rex is lex." "The king, *pro bono publico*," said Vernon, another judge, "may charge his subjects, for the safety and defence of the kingdom, notwithstanding any act of parliament, and a statute derogatory from the prerogative doth not bind the king; and the king may dispense with any law in cases of necessity." Sir John Finch, Chief Justice of the Common Pleas, who had himself advised the extension of the writs of ship-money to inland counties, followed in the same strain: "No act of parliament," he said, "can bar a king of his regality, as that no land should hold of him, or bar him of the allegiance of his subjects or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom are void; they are void acts of parliament to bind the king not to command the subjects, their persons, and goods, and I say their money too: for no acts of parliament make any difference" (*y*).

Effect of this judgment.

Charles had little cause for rejoicing at the legal decision in his favour. Its only effect was to make Hampden the most popular man in England, and to strengthen and widely extend the public indignation. "It is notoriously known," says Lord Clarendon, "that pressure [ship-money] was borne with much more cheerfulness before the judgment for the king than ever it was after; men before pleasing themselves with doing somewhat for the king's service, as a testimony of their affection, which they were not bound to do, many really believing the necessity, and therefore thinking the burthen reasonable; others observing that the advantage to the king was of importance, when the damage to them was not considerable, and all assuring

(*y*) 3 St. Tr., 825; [Broom, Const. Law, pp. 303-367]; Hallam, Const Hist., ii. [21, 22].

themselves that when they should be weary or unwilling to continue the payment, they might resort to the law for relief, and find it. But when they heard this demanded in a court of law as a right, and found it, by sworn judges of the law, adjudged so, upon such grounds and reasons as every stander-by was able to swear was not law, and so had lost the pleasure and delight of being kind and dutiful to the king, and instead of giving were required to pay, and by a logic that left no man anything which he might call his own; they no more looked upon it as the case of one man, but as the case of the kingdom, nor as an imposition laid upon them by the king, but by the judges, which they thought themselves bound in conscience to the public justice not to submit to. It was an observation long ago by Thucydides, 'that men are more passionate for much injustice than for violence, because,' says he, 'the one coming as from an equal seems rapine, when the other, proceeding from one stronger, is but the effect of necessity.' So, when ship-money was transacted at the Council Board, they looked upon it as a work of that power they were all obliged to trust, and an effect of that foresight they were naturally to rely upon. Imminent necessity and public safety were convincing persuasions; and it might not seem of apparent ill-consequence to them, that upon an emergent occasion the royal power should fill up an hiatus, or supply an impotency in the law. But when they saw in a court of law (that law that gave them title to, and possession of, all that they had reasons of state urged as elements of law), judges as sharp-sighted as secretaries of state, and in the mysteries of state; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof, and no reason given for the payment of the thirty shillings in question, but what included the estates of all the standers-by; they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds, and it was no wonder that they, who had so little reason to be pleased with their own condition, were no less solicitous for, or apprehensive of, the inconveniences that might attend any alteration.

"And here the damage and mischief cannot be expressed that the crown and state sustained, by the deserved re-

proach and infamy that attended the judges, by being made use of in this and like acts of power; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves but by the integrity and innocency of the judges. And no question, as the exorbitancy of the House of Commons, in the next parliament, proceeded principally from their contempt of the laws, and that contempt from the scandal of that judgment; so the concurrence of the House of Peers in that fury, can be imputed to no one thing more than to the irreverence and scorn the judges were justly in, who had been always before looked upon there as the oracles of the law, and the best guides to assist that House in their opinions and actions. And the Lords now thought themselves excused for swerving from the rules and customs of their predecessors (who, in altering and making of laws, in judging of things and persons, had always observed the advice and judgment of those sages), in not asking questions of those whom they knew nobody would believe: thinking it a just reproach upon them (who, out of their councilship, had submitted the difficulties and mysteries of the law to be measured by the standard of what they called general reason, and explained by the wisdom of state) that they themselves should make use of the licence, which the others had taught them, and determined that to be law which they thought to be reasonable, or found to be convenient. If these men had preserved the simplicity of their ancestors, if severely and strictly defending the laws, other men had observed the modesty of theirs, in humbly and dutifully obeying them" (*z*).

The Scottish rebellion.

It was not long after the condemnation of Hampden that Charles entered upon his rash and unwise attempt to change the ecclesiastical position in Scotland, and to force upon the people of that kingdom a liturgy which the great body of them regarded with fanatic abhorrence. The Scots, having drawn up and signed their celebrated Covenant (March 1638), at length took up arms in defence of their religious freedom. By the ignominious pacification of Berwick (June 18, 1639), the contest was only

(*z*) Hist. Rebell., i. 69.

adjourned, and both sides almost immediately began to prepare for a renewal of the war. In this emergency, the real impotence of the king's arbitrary system of government became apparent. The illegal methods of supply so long practised proved utterly inadequate for the support of an army, and the king, after eleven years of despotic rule, most reluctantly yielded to the advice of his council, and issued writs for a parliament, which met on April 13, 1640.

Fourth (the Short) Parliament. 1640. April 13-May 5.

It is remarkable that the House of Commons which met after so long a period of arbitrary misgovernment was admitted on all sides to be one of the most moderate and loyal assemblies which had been known for many years. "The House generally," says Clarendon, "was exceedingly disposed to please the king and do him service. It could never be hoped," he remarks elsewhere, "that more sober or dispassionate men could ever meet together in that place, or fewer who brought ill purposes with them" (*a*). Charles pressed for an ample and immediate supply, and pledged his word that if the commons would gratify him with the despatch of this matter, he would give them time enough afterwards to represent any grievances to him. But the commons, led by Pym and Hampden, and mindful how shamefully the royal word had been already violated, showed a thorough determination to have their accumulated grievances redressed before voting supplies. They declared that the conduct of the Speaker on the last day of the former parliament, in refusing, at the alleged command of the king, to put the question; and the prosecution and imprisonment of Eliot, Holles, and Valentine, for their behaviour in parliament, were breaches of privilege. The proceedings against Hampden in the case of ship-money were inquired into by a committee and reported matter of grievance; and the various other illegal proceedings during the long discontinuance of parliament were discussed in detail. "Let us not stand too nicely upon circumstances," said Edmund Waller; "let us do what may be done with reason and honesty on our part to comply with the king's desires."

Charles demands an immediate supply. The commons insist on redress of grievances.

(*a*) Ibid. i. 139.

But let us first give new force to the old laws for maintaining our rights and privileges, and endeavour to restore this nation to its fundamental and vital liberties—to property of our goods, and the freedom of our persons. The kings of this nation have always governed by parliaments; but now divines would persuade us that a monarch must be absolute, and that he may do all things *ad libitum*. Since they are so ready to let loose the conscience of the king, to enterprise the change of a long-established government, we are the more carefully to provide for our protection against this pulpit-law by declaring and re-enforcing the municipal laws of the kingdom" (*b*).

Committee to confer with the lords on grievances.

With this object, a committee was appointed to confer with the peers on a long list of grievances divided, by the advice of Pym, into the three heads of innovations in religion, invasions of private property, and breaches of the privileges of parliament. Impatient at the delay, Charles had recourse to the interposition of the lords. They voted that in their opinion "the supply should have precedency, and be resolved upon before any other matter whatsoever," and in a conference communicated this resolution to the commons. The latter at once voted this a high breach of their privileges, which the lords answered by a disclaimer of any intention to interfere with the undoubted right of the commons, admitting that "the bill of subsidies ought to have its inception in your House; and that when it comes up to their lordships, and is by them agreed to, it must be returned back to you, and be, by your Speaker, presented" (*c*).

Exclusive right of commons to initiate money-bills.

(*b*) Parl. or Const. Hist., viii. 441.

(*c*) Besides the exclusive right of initiating money-bills, the commons also maintained that such bills should not be amended by the lords. In 1671, they successfully disputed the right of the lords to reduce the amount of an imposition; and since that year the lords have tacitly acquiesced in the contention of the commons. Whenever amendments have been made which the commons were desirous of adopting, they have invariably saved their privilege by throwing out the amended bill and sending up a fresh bill embodying the lords' amendments. But while abstaining from direct interference with grants of supply, the lords occasionally, without objection from the Lower House, rejected or postponed other bills incidentally affecting supply and taxation, such as bills for the regulation of trade and for imposing or repealing protective duties. When, however, in 1790, they amended a bill for regulating Warwick Gaol, by shifting the proposed rate from the owners to the occupiers of land, the commons vindicated their

Amendments to money-bills by the lords.

Charles offers to give up ship-money for twelve subsidies.

In the meantime the king sent a message to the commons offering, if they would grant him twelve subsidies (about £850,000), payable in three years, to give up the pre-

privilege by throwing out the bill. The right of the lords to reject a money-bill, "to pass all or reject all, without diminution or alteration," was explicitly admitted by the Lower House in 1671 and 1689; but as the exercise of this right involved the withholding supplies from the crown, the lords were loth to avail themselves of it, and, unable to exercise any control, ceased for the most part even to discuss financial measures. When, in 1763, they opposed the third reading of the Wines and Cider Duties Bill, it was observed that this was the first occasion on which they had been known to divide upon a money-bill. At length, in 1860, the lords exercised their legal right of rejection, "in a novel and startling form," by rejecting a bill for the repeal of the paper-duty, after bills for the increase of the property-tax and stamp-duties, intended to supply the deficiency which would be caused by such repeal, had already received the royal assent. The legal right of the lords to reject any bill whatever was indisputable; and this particular bill had encountered stormy opposition in the Lower House, where it was only carried by a majority of nine. "Yet it was contended," observes Sir Erskine May, "with great force, that to undertake the office of revising the balances of supplies and ways and means—which had never been assumed by the lords during two hundred years—was a breach of constitutional usage, and a violation of the first principles upon which the privileges of the House are founded. If the letter of the law was with the lords, its spirit was clearly with the commons." After the lapse of six weeks, during which a committee of the commons had searched for precedents and reported to the House, Lord Palmerston, on the part of the Government, addressed the House, deprecating a collision with the lords, and expressing his opinion that, in rejecting the Paper Duties Bill, they had been actuated by motives of public policy merely, without any intention of entering upon a deliberate course of interference with the peculiar functions of the commons; adding, however, that should that appear to be their intention, the latter would know how to vindicate their privileges, if invaded, and would be supported by the people. He concluded by proposing three resolutions, which were passed by the House: (1) "That the right of granting aids and supplies to the crown is in the commons alone"; (2) That, although the lords had sometimes exercised the power of rejecting bills relating to taxation, yet the exercise of that power was "justly regarded by this House with peculiar jealousy, as affecting the right of the commons to grant supplies and to provide the ways and means for the service of the year"; and (3) That to secure to the commons their rightful control over taxation, "this House has in its own hands the power so to impose and remit taxes, and to frame bills of supply, that the right of the commons as to the matter, manner, measure, and time, may be maintained inviolate." In the following session the commons effectually prevented a second interference by the lords, by including the repeal of the paper-duty in a general financial measure granting the property-tax, the tea and sugar duties, and other ways and means for the service of the year, which the lords were constrained to accept.—May, Const. Hist., ii. 104-112. [*Vide* also May, Parl. Practice, 11th ed., pp. 574 *seq.* "It would seem," writes Pike, Const. Hist. of House of Lords, p. 345, "that, should the commons always follow the same policy, the lords would lose even the power of throwing out a money-

rogative of ship-money. But the commons were by no means inclined to purchase that which they justly claimed as their right. Many observed "that they were to purchase a release of an imposition very unjustly laid upon the kingdom, and by purchasing it, they should upon the matter confess it had been just; which no man in his heart acknowledged": and therefore wished "that the judgment might be first examined, and being once declared void, what they should present the king with would appear a gift and not a recompense" (*d*). The message was, however, taken into favourable consideration, and the commons were on the point of deciding that a supply should be granted to the king, leaving the amount and the manner for subsequent consideration, when Sir Henry Vane, Secretary of State, told them that if the supply were not voted in the amount and manner proposed in the king's message, it would not be accepted. This caused an adjournment of the debate, and the next day the king angrily dissolved parliament, which had sat only three weeks (*e*). "There could not a greater damp," says Clarendon, "have seized upon the spirits of the whole nation than this dissolution caused: and men had much of the misery in view which shortly after fell out. Nor could any man imagine what offence the commons had given, which put the king upon that resolution. But it was observed that in the countenances of those who had most opposed all that was desired by his Majesty, there was a marvellous serenity; nor could they conceal the joy of their hearts: for they knew enough of what was to come, to conclude that the king would be shortly compelled to call another parliament, and they were as sure that so many so unbiased men would never be elected again" (*f*).

The commons decline to purchase immunity from an illegal imposition.

Parliament dissolved.

Effect of the dissolution.

bill, or would be able to assert it only at the risk of interrupting all legislation affecting the public revenue and expenditure." This forecast of Mr. Pike was actually fulfilled. A money-bill associated with the name of the chancellor of the exchequer, Mr. Lloyd George, was, in 1909, sent up to the Upper House and rejected, entailing the consequences Mr. Pike prophesied would happen. The great constitutional issues involved are more nearly dealt with *supra*, p. 269, note, and *infra*, p. 769.—Ed.]

(*d*) Clarendon, Hist., i. 136.

(*e*) *Ibid.* i. 138.

(*f*) *Ibid.* i. 139.

The king resumes his old despotic courses.

Charles now returned to his old despotic courses. Several members of the late House of Commons were committed to prison. Forced loans were exacted; fresh monopolies were created. Ship-money was enforced with even greater rigour than before, and the Lord Mayor and sheriffs of London were prosecuted in the Star Chamber for neglecting to levy it. A new imposition was laid upon the counties, under the name of "coat and conduct money," for clothing and defraying the travelling expenses of the recruits whom the king had pressed into his services against the Scots.

Convocation continued.

In order to obtain a grant of six subsidies from the clergy, Convocation was unconstitutionally continued after the dissolution of parliament, under a fresh commission authorising its sittings "during pleasure," and empowering it to alter and amend the laws of the church. It accordingly framed and promulgated a set of canons which greatly irritated both the political and religious feelings of a great part of the nation. In addition to inculcating the divine right of kings, and denouncing the damnable sin of resistance to authority, a new oath "for the preventing of all innovations in doctrine and government" was appointed to be taken by all clergymen, and all graduates in the universities, while separatists of all denominations were subjected to the same penalties as Romish recusants (*g*).

Failure of military operations against the Scots. 1640, Aug. 28.

In his military operations against the Scots, Charles failed utterly and ignominiously. After the defeat at the ford of Newburn-on-Tyne, the English army, disheartened, undisciplined, and disaffected, had retreated to York, leaving the four northern counties to be possessed by the victors. "The game of tyranny," observes Macaulay, "was now up. Charles had risked and lost his last stake. . . . His army was mutinous, his treasury was empty; his people clamoured for a parliament; addresses and petitions against the government were presented. Strafford was for shooting the petitioners by martial law; but the king could not trust the soldiers.

Great council of peers summoned at York.

A great council of peers was called at York, but the king could not trust even the peers. He struggled, evaded,

(*g*) Neal, Hist. Purit., ii. 302.

hesitated, tried every shift, rather than again face the representatives of his injured people. At length no shift was left. He made a truce with the Scots and summoned a parliament" (*h*).

The Long Parliament. Nov. 3, 1640.

On November 3, 1640, met that renowned parliament "destined to every extreme of fortune, to empire and to servitude, to glory and to contempt: at one time the sovereign of its sovereign, at another time the servant of its servants": but which, "in spite of many errors and disasters, is justly entitled to the reverence and gratitude of all who, in any part of the world, enjoy the blessings of constitutional government" (*i*). The elections had proceeded with the utmost excitement throughout England. The court candidates were rejected on all sides. The exertions of the leaders of the popular party—of Hampden in particular, who rode from shire to shire exhorting the electors to return worthy members (*k*)—secured an overwhelming majority on the side of the opposition. "There was observed," says Clarendon, "a marvellous elated countenance in most of the members before they met together in the House: the same men who six months before were observed to be of very moderate tempers, and to wish that gentle remedies might be applied without opening the wound too wide and exposing it to the air, and rather to cure what was amiss than too strictly to make inquisition into the causes and origin of the malady, talked now in another dialect both of things and persons, and said that they must now be of another temper than they were the last parliament; that they had now an opportunity to make their country happy by removing all grievances and pulling up the causes of them by the roots, if all men would do their duties" (*l*).

Speech of Pym on the state of the kingdom.

The first day on which the House met for business, Pym delivered a long and eloquent speech on the miserable state and condition of the kingdom, denouncing the many arbitrary proceedings of the government as "done and

(*h*) Macaulay ("Hampden").

(*i*) *Ibid.*, *loc. cit.*, and Works, i. 76.

(*k*) [50,000 emigrants had already left the country for the New World, in consequence of the reign of terror under the Star Chamber.—Ed.]

(*l*) Clarendon, Hist., i. 171.

contrived maliciously, and upon deliberation, to change the whole frame, and to deprive the whole nation, of all the liberty and property which was their birthright by the laws of the land, which were now no more considered but subjected to the arbitrary power of the Privy Council, which governed the kingdom according to their will and pleasure." Of the persons who had contributed their joint endeavours to bring this misery upon the nation he named the Earl of Strafford, as "one more signal in that administration than the rest, being a man of great parts and contrivance, and of great industry to bring what he designed to pass; a man who in the memory of many present, had sat in that House an earnest vindicator of the laws, and a most zealous asserter and champion for the liberties of the people; but that it was long since he turned apostate from those good affections, and, according to the custom and nature of apostates, was become the greatest enemy to the liberties of his country, and the greatest promoter of tyranny that any age had produced." It was resolved, with "an universal approbation and consent from the whole House," to impeach Strafford of high treason. Pym immediately carried up the message to the bar of the lords, who, with very little debate, committed the earl to the custody of the usher of the black rod, there to remain until the commons should bring in a particular charge against him (*m*). That Strafford had been technically guilty of the crime of high treason was a matter of grave doubt, and his execution (May 12, 1641) under a bill of attainder, brought in after a lengthy trial had failed to secure the probability of a legal conviction, and passed, amidst popular tumults, by the small majority of seven in a House of Peers which could muster only forty-five votes, has procured for him that sympathy which violence invariably assures to its victims. But there can be no doubt that from the time when he devoted his consummate abilities to the establishment of that despotic system of government which he emphatically termed "Thorough," he became and continued a most formidable enemy to his country's freedom. However unsatisfactory

Impeachment of Strafford.

(*m*) *Ibid.* i. 174.

in a purely legal point of view, the hesitating opinion of the judges may be taken as truly expressing at least his moral guilt, when they declared that he "deserved to undergo the pains and forfeitures of high treason by law" (*n*).

Impeachment of Laud, Finch, Windebank, and others.

The impeachment of Strafford was followed up by that of Archbishop Laud: of the lord-keeper Finch: of Windebank, Secretary of State: of six of the judges for their conduct in relation to ship-money: and of some other laymen and ecclesiastics (*o*).

Victims of the Star Chamber released.

The condemnation of Prynne, Burton, Bastwick, Leighton, and Lilburne, those victims of the tyranny of the Star Chamber, was declared illegal, and their liberation ordered. The return journey of the three former from their island prisons in Jersey, Guernsey, and Scilly, formed a triumphal procession, "great herds of people meeting them at their entrance into all towns, and waiting upon them out with wonderful acclamations of joy." Near London they were met by "above ten thousand persons, with boughs and flowers in their hands, the common people strewing flowers and herbs in the ways as they passed, making great noise and expressions of joy for their deliverance and return; and in those acclamations mingling loud and virulent exclamations against the bishops 'who had so cruelly prosecuted such godly men'" (*p*).

Assistance voted to the Scots.

In the meantime, the presence of the Scottish army in the northern counties rendered the king powerless to resist the will of his parliament. Instead of aiding him "to chase out the rebels," as he had asked them to do in his opening speech, the commons fraternised with their "brethren of Scotland," and in addition to a grant of £25,000 a month so long as their stay in England should

(*n*) See *infra*, p. 632.

(*o*) For the details of Laud's impeachment, see *infra*, pp. 633, 634. Finch and Windebank saved themselves by flight beyond sea; some of the other persons were never brought to trial, and the remainder were sentenced to payment of heavy fines. [One of the judges was actually arrested on the judicial bench in Westminster Hall. A resolution passed in both Houses of Parliament laid it down for the future that judges should be appointed for life, "quamdiu se bene gesserint": *cf.* Gneist, Hist. Engl. Const., p. 555, note.—Ed.]

(*p*) Clarendon, Hist., i. 202 (bk. iii.).

be necessary, voted them the sum of £300,000 as an indemnity and recompense for their brotherly assistance (*q*).

Salutary Acts of the Long Parliament.

Master of the situation, the parliament used its power with energy, tact, and moderation. During the first session of ten months a number of salutary Acts were passed, which, while sweeping away most of the accumulated abuses of recent times, left the ancient constitution intact, and the just prerogatives of the king undiminished.

The Triennial Act, 1641.

(1) The first of these statutes regulated the intermission and duration of parliament. By the "Act for the preventing of inconveniences happening by the long intermission of parliaments," it was provided that if in every third year parliament was not duly summoned and assembled before the third day of September, it should, nevertheless, assemble on the second Monday in the ensuing November. For this purpose, the lord chancellor, or keeper of the great seal, should be sworn to issue the writs for a new parliament in due time, under pain of disability to hold his office, and further punishments: in case of his default, the peers were enabled and directed to meet at Westminster, and any twelve or more of them to issue the writs; failing the peers, the sheriffs, mayors, and bailiffs should cause elections to be made; and lastly, in their default, the electors themselves were to meet and proceed to choose their representatives, in the same manner as if writs had been regularly issued from the crown. No future parliament was to be dissolved, prorogued, or adjourned within fifty days after the time appointed for its meeting, except with its own consent; but it should be *ipso facto* dissolved at the expiration of three years from the first day of its session, unless actually sitting at the time, in which case the dissolution should be postponed till its first subsequent adjournment or prorogation (*r*).

In the reigns of Edward II. and Edward III. it had been provided by statute that parliament should be holden at least once in every year (*s*), but as no provision was then made in case of the failure of the king to issue the necessary writs, the law had been dispensed with at

(*q*) Parl. or Const. Hist., ix. 93.
(*r*) 16 Car. I. c. 1; repealed in 1664, by 16 Car. II. c. 1.
(*s*) *Supra*, pp. 248, 251.

pleasure. The known resolution of Charles to govern without a parliament made it absolutely necessary that this defect in the machinery of the constitution should be remedied. Carefully adhering to the old lines, the Triennial Act left untouched the king's prerogative of calling parliament, and even extended the legal period of intermission from one year to three. It was only in the event of the king failing to exercise his prerogative within the prescribed time that another mode was provided for ensuring the supremacy of the law. The limit placed on the duration of any one parliament, although a novelty, was merely a matter of detail which did not trench upon the principle of the constitution. The House of Commons not being an estate in itself, but merely the representative of an estate of the realm, must be periodically renewed, or it would cease to be a really representative assembly. The precise limit of duration, whether one year, or three, or seven, or any other number, is a matter to be decided by considerations of practical convenience and efficacy.

Tonnage and poundage granted for two months.

An Act was passed putting an end to the long-contested prerogative of levying customs on merchandise. By this Act (which granted to the king tonnage and poundage for less than two months), after reciting that these duties, not having been granted by parliament, had been collected against the laws of the realm, and that the farmers and collectors had received condign punishment, it was provided that in future any officer presuming to levy these customs, except during the time specified in the Act, should incur the penalties of praemunire, and be disabled during life to sue in any court. It was further, in general terms, "declared and enacted that it is, and hath been, the ancient right of the subjects of this realm, that no subsidy, custom, impost, or other charge whatsoever, ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens, or aliens, without common consent in parliament" (*t*).

Ship-money abolished.

An "Act for the declaring unlawful and void the late proceedings touching ship-money, and for the vacating of all records and process concerning the same," was passed,

(*t*) 16 Car. I. c. 8. The grant was continued by six subsequent Acts (cc. 12, 22, 25, 29, 31, 36) for short periods down to July 2, 1642.

declaring that charge illegal, and annulling the judgment in the Exchequer Chamber against Hampden as contrary to the laws and statutes of the realm, the right of property, the liberty of the subject, and the Petition of Right (*u*). These two Acts closed the lengthy series of statutes which during the course of centuries had been passed in restraint of arbitrary taxation by the crown.

Star Chamber abolished.

The next care of parliament was to sweep away all those irregular and arbitrary tribunals which had been the principal instruments of despotic power. By an "Act for the regulating of the Privy Council, and for taking away the court commonly called the Star Chamber," after reciting Magna Carta and its train of statutes for protecting the liberty and property of the subject, the court of Star Chamber was abolished, and the old constitutional principle re-enunciated "that neither his Majesty nor his Privy Council hath, or ought to have, any jurisdiction, power, or authority, by any arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." Under this statute, although the jurisdiction of the Privy Council, as well as of the Star Chamber, to try and determine any civil or criminal cause, was abrogated, the Council still retained the power of examining and committing persons charged with offences. But it was enacted that every person committed by the Council, or any of them, or by the king's special command, should, on application to the judges of the King's Bench or Common Pleas, have granted unto him, without delay on any pretence whatever, a writ of habeas corpus; that in the return to the writ the gaoler should certify the true cause of commitment, and that the court whence the writ had issued should, within three days, examine, and determine whether the cause were just and legal or not, and thereupon do what to justice should appertain, either by deliver-

(*u*) 16 Car. I. c. 14. Five of the judges who had pronounced in favour of ship-money (Berkeley, Crawley, Davenport, Trevor, and Weston) were imprisoned for their judgment.

ing, bailing, or remanding the prisoner (*w*). Another clause of this Act abolished the court of the President and Council of the North—which under Strafford's arbitrary administration had given so much offence—the court of the President and Council of the Welsh Marches (which extended its jurisdiction over the adjacent counties of Salop, Worcester, Hereford, and Gloucester), the court of the Duchy of Lancaster, and the Court of Exchequer of the County Palatine of Chester—all irregular tribunals which, "under various pretexts, had usurped so extensive a cognizance as to deprive one-third of England of the privileges of the common law" (*x*).

High Commission Court abolished.

With the court of Star Chamber and the provincial irregular tribunals fell also the court of High Commission. By an Act intituled "A repeal of a branch of a statute primo Elizabethæ, concerning commissioners for causes ecclesiastical," after reciting that the commissioners, to the insufferable wrong and oppression of the king's subjects, had illegally assumed the right to fine and imprison for ecclesiastical offences, the clause of the statute under which the court had been erected was repealed, and the other ecclesiastical courts were deprived of all power to inflict fine, imprisonment, or corporal punishment (*y*).

Purveyance; compulsory knighthood; royal forests.

By other statutes the vexatious prerogative of purveyance was restrained, writs to compel the taking up of knighthood were abolished, and the boundaries of the royal forests were again reduced to their limits in the twentieth year of James I. (*z*).

(*w*) 16 Car. I. c. 10.

(*x*) Hallam, Const. Hist., ii. 99. By another Act (16 Car. I. c. 15) certain abuses in the Stannary Courts of Cornwall and Devon were remedied. [*Cf. supra*, p. 303, *n.*—Ed.] The Council of the North was instituted by Henry VIII., at York, in 1537, after the suppression of the great northern insurrection, to administer justice and maintain order in Yorkshire and the four more northern counties, independently of the courts of Westminster. Strafford, as president, greatly extended the jurisdiction of this court, and excited much odium by his tyranny and arrogance. The courts of the Council of the North and of the Marches of Wales were entirely abolished, but the jurisdiction of those of the Duchy of Lancaster and of the County Palatine of Chester was preserved as to matters touching the king's private estate.

(*y*) 16 Car. I. c. 11. The latter part of the Act was repealed after the Restoration.

(*z*) 16 Car. I. cc. 16, 19, 20.

Impressment declared illegal.

Among the beneficial Acts of the Long Parliament is also to be reckoned one which, while empowering the king to levy troops, compulsorily for the suppression of the Irish rebellion, recites in the preamble that, "by the laws of this realm none of his Majesty's subjects ought to be impressed or compelled to go out of his country to serve as a soldier in the wars, except in case of necessity of the sudden coming in of strange enemies into the kingdom, or except they be otherwise bound by the tenure of their lands or possessions" (*a*).

Impressment, for the army;

(*a*) 16 Car. I. c. 28. Since this statute, impressment for the army has never been exercised by virtue of the royal prerogative; but under the authority of parliament it has occasionally been resorted to, more especially during the American war, as, *e.g.*, in 1779, by statute 19 Geo. III. c. 10. In later times, however, this odious violation of personal liberty—which has nothing in common with a national conscription applicable to *all* able-bodied citizens alike—has not been practised for strengthening the land forces, which have been recruited by enlistment, stimulated by bounties.

for the navy.

Impressment of *sailors* for the public service seems always to have stood on a somewhat different footing from military impressment. It is "a prerogative inherent in the crown," says Sir Michael Foster, "grounded upon common law and recognised by many Acts of Parliament." (2 Ric. II. c. 4; 2 & 3 Phil. and Mary, c. 16; 7 & 8 Will. III. c. 21; 2 & 3 Anne, c. 6; 4 & 5 Anne, c. 19; 5 & 6 Will. IV. c. 24.) [Foster's view was affirmed by Lord Mansfield in *R.* v. *Tubbs* (1776), Cowp. 512; and by Lord Kenyon in *Ex parte Fox* (1793), 5 T. R. 276.] Several early statutes against the impressment of soldiers (1 Edw. III. c. 5; 25 Edw. III. c. 8) are silent as to the impressment of sailors; a difference between the two services which was probably due in some measure to the fact that while the land service was provided for in ordinary cases by the military tenures and by the *jurati ad armą* or national militia, no competent provision was made by law for the ordinary sea-service (except in the case of the Cinque Ports and a few others, which were altogether inadequate for the public service). During the American war the hardships and cruelties of the system of naval impressment, carried out by armed pressgangs, were a disgrace to a free country; and since the conclusion of peace, ministers and parliament, alive to the dangerous principles on which recruiting for the navy had hitherto been conducted, have devised new expedients—higher wages, larger bounties, shorter periods of service, and a reserve volunteer force—more consistent with the liberty of the subject. The right of impressment for the navy has not yet been formally renounced by law; but the Commission on manning the navy, in 1859, reported that "the evidence of the witnesses, with scarcely an exception, shows that the system of naval impressment, as practised in former wars, could not now be successfully enforced."—See Foster, Crown Law, 154-180; and May, Const. Hist., iii. 20-24. [*Cf.* also Broom, Const. Law, pp. 111-113, where the author appears to consider impressment for the navy to be "one species of compulsory servitude, the legality of which rests on an intelligible principle, and depends on our customary law."—Ed.] [For a broad comparison of the English military system with the continental institutions, *vide* Gneist, Engl. Const. Hist. p. 634, *n.*, and *infra*, pp. 643 *seq.*—Ed.]

Upon the foregoing statutory measures of the Long Parliament Hallam makes two just remarks: (1) "They made scarce any material change in our constitution such as it had been established and recognised under the House of Plantagenet . . . the monarchy lost nothing that it had anciently possessed: and the balance of our constitution might seem rather to have been restored to its former equipoise than to have undergone any fresh change." (2) "By these salutary restrictions, and some new retrenchments of pernicious or abused prerogative, the Long Parliament formed our constitution such nearly as it now exists" (*b*).

Effect of the foregoing legislation.

Two other statutes of the Long Parliament, one providing that the parliament then sitting should not be prorogued or dissolved without its own consent, and the other depriving the bishops of their suffrages among the peers, are more open to animadversion. They were both departures from the old lines of the constitution; but the one, which was of a purely temporary nature, was rendered necessary by the deep and well-founded distrust which the character of Charles had inspired (*c*); the other was the outcome of that abuse of their coercive jurisdiction and temporal power by which the bishops had rendered themselves odious not merely to the puritans, but even to many of those who wished well to the cause of both church and king (*d*).

Acts against the dissolution of parliament without its own consent, and for disabling the clergy to exercise temporal jurisdiction.

(*b*) Hallam, Const. Hist. ii. 101, 102.

(*c*) The "Act to prevent inconveniences which may happen by the untimely adjourning, proroguing, or dissolving of this present Parliament" (16 Car. I. c. 7), was ostensibly grounded on the necessity of speedily raising money for the relief of the army in the northern parts of the realm, and the impossibility of borrowing "on the authority of resolutions of parliament," unless some security was furnished to the creditors, that the assembly would not be dissolved before sufficient provision had been made for repayment of the moneys to be raised. But the chief motive was, undoubtedly, "a just apprehension of the king's intention to overthrow the parliament," and of personal danger to the popular leaders after a dissolution. It was clearly proved that the king had given his sanction to a plan to bring up the English army from the north in order to overawe the parliament.—Hallam, Const. Hist., ii. 113.

(*d*) In a very remarkable conversation with Hyde, Sir Edmund Verney, who was killed at the battle of Edgehill, declared his reluctance to fight for the bishops, whose quarrel he took it to be, though bound in gratitude not to desert the king.—Clarendon, Life, p. 66. The Act to disable persons in holy orders to exercise any temporal jurisdiction or authority (16 Car. I.

After a session of ten months devoted to passing the series of Acts above enumerated, the two Houses, in September 1641, adjourned for a short recess of six weeks. It was about this time that a final schism in the constitutional party developed itself. The concessions already made by the king were deemed by a large minority a sufficient surrender of the royal power. "The king was now," observes Mr. Forster, "to all appearance the weaker party, and the House of Commons was the stronger; and how readily sympathy is attracted to those who are weak, however much in the wrong, and how apt to fall away from the strong, however clearly in the right, it does not need to say. The popular leaders became conscious of daily defections from the ranks; the House of Lords unexpectedly deserted them on questions in which they had embarked in unison; the army was entirely unsafe; and opinions began to be busily put about that enough had been conceded by the king, and that the demand for more would be ungenerous." ["The constitutional struggle had now reached a stage which in the Middle Ages was usually concluded with a treaty of peace, with solemn compacts on oath under the guarantee of the church. But it was soon manifest that a compact of this description to suit both sides could no longer be obtained"] (*e*).

Schism in the constitutional party.

"Never had a great cause been in peril more extreme. For most thoroughly was the character of their adversary known to its chiefs, and that not a single measure of redress had been extorted from him which was not yielded in the secret hope of finding early occasion to reclaim it. It was notorious that Charles I. entertained a belief of the invalidity of the most important of the measures already passed by the Long Parliament on the ground that his own assent, having been given by compulsion, was *ipso facto* void. His attorney-general had encouraged him in this notion (*f*); and Hyde himself (*g*) cannot help condemning the facility with which he assented to Acts requiring grave

The king's view as to his assent.

c 27), passed Feb. 1641-1642, was repealed after the Restoration by 13 Car. II. c. 2.

(*e*) [Gneist, Hist. Engl. Const., p. 556.—Ed.]

(*f*) Clarendon, Life and Continuation, i. 206-211.

(*g*) Clarendon, Hist., ii. 252.

deliberation, in reliance on this dangerous opinion that the violence and force used in procuring them rendered them absolutely invalid and void" (*h*).

The leaders of the commons were convinced, rightly as we now know, that the king was bent upon recovering, by force or fraud, the arbitrary powers which he had been compelled to surrender; that unless further securities were taken, and a constant vigilance maintained, there was danger not only of the loss of their newly vindicated liberties, but of the subversion of the existing free parliamentary constitution and the establishment in its stead of the personal government of the king. As under Richard II., so now under Charles I., the question between king and people was again practically narrowed to the simple issue of absolute monarchy versus parliamentary government. Pym and his co-workers in the parliament felt that the time had come to make an earnest appeal to the people, warning them, by a recital of the lessons of the past, that no faith could be reposed in the king.

The parliamentary leaders resolve to appeal to the people.

In the meantime Charles had gone to Edinburgh, much against the wish of the commons, partly for the purpose of adjusting the points of difference which remained between him and his Scottish subjects, but mainly, as has since been shown, with the object of gathering "supposed proofs with which to build a charge of treason against Pym and Hampden, and such accessions from the undisbanded Scottish army to the conspirators of the army of the north as to render safe the prosecution of such a charge" (*i*).

Charles's aim at the leaders.

Chiefly with the view of saving Strafford's life, the king had, some months previously, made overtures for giving office to the leaders of the popular party, and had even made St. John, one of the most uncompromising opponents of the court, solicitor-general, besides appointing Lords Essex, Holland, and Saye to other posts. But the ill-timed death of the Earl of Bedford, a puritan who was to have been made lord treasurer, and the discovery of the first army plot, had caused the scheme to fall through. Warned before his departure for Scotland of the intention of the

Negotiations for giving office to the popular leaders.

(*h*) Forster, Grand Remonstrance, p. 154.
(*i*) *Ibid.* p. 154.

leaders of the popular party to put forth the Grand Remonstrance, Charles now caused negotiations to be opened for a revival of the plan of giving them office. "What had formerly for its object to save Strafford's life was now designed to save the king, by giving him time to ruin the very men he was meanwhile to invite to serve him. The continued hostility of Pym and Hampden to the Scottish visit, and their calm determination to bring forward the Remonstrance, baffled the plan" (*k*).

The "Incident" in Scotland.

At Edinburgh Charles set himself to winning over the parliament and church of Scotland against the parliament of England, by granting all their demands, by assiduously attending the presbyterian worship, and by lavishing favours upon the chiefs of the covenanters. At the same time he was secretly searching for proofs of the correspondence of the English political leaders with the Scots prior to the late invasion, with the object of bringing a charge of treason against the former, on his return. Acting on information supplied by the Earl of Montrose that the Marquis of Hamilton and the Earl of Argyle had been implicated in the plans of the English malcontents, the king even assented to a design for their sudden arrest and the seizure of their papers; but these two noblemen, forewarned of the plot, frustrated it by publicly withdrawing from the Scottish parliament, and seeking refuge in Kinneil Castle, the residence of Hamilton's brother. The king complained of the suspicions of the lords as an insult to his honour. A committee of inquiry was ordered by the parliament, which elicited nothing decisive on either side, and Hamilton and Argyle were induced to return to parliament. But the leaders of the English House of Commons, which had sent a small committee to Scotland, with Hampden as its presiding member, to be near the king and watch proceedings, were kept well informed of the real facts. And the news of the "Incident," as the affair of Hamilton and Argyle was popularly termed, excited much agitation and alarm in London, lest this design against the two great leaders of the constitutional party in the northern kingdom should be followed by

(*k*) Forster, Grand Remonstrance, p. 159.

similar measures against the English malcontents. About the same time (Nov. 1) came tidings of the Irish rebellion, with its attendant massacre, which raised a fierce outcry against all papists, and was by many believed to have been secretly instigated or encouraged by the king (*l*).

Rebellion in Ireland.

On October 20, 1641, the parliament re-assembled. An examination into an alleged new army plot was instituted in the commons, and on November 18, Pym moved and carried a resolution "that in the examinations now read unto us, we did conceive that there was sufficient evidence for us to believe, that there was a second design to bring up the army to overawe the deliberations of this House." "This," observes Mr. Forster, "was the most direct avowal yet made of a consciousness on the part of the commons, not merely of what had taken the king to Scotland, but of what still kept him there. The alarm and dismay it carried with it showed how unerringly the mark had been hit" (*m*).

Re-assembling of parliament, Oct. 20, 1641.

Motion of Pym on the new army plot.

On November 8 the rough draft of the Remonstrance, or "Declaration of the state of the kingdom," was laid upon the table of the House. Secretary Nicholas at once wrote to the king informing him of the fact, and urging his instant return to London. In reply the king wrote: "You must needs speak with such of my servants that you may best trust, in my name, that by all means possible this Declaration may be stopped." Under the leadership of Hyde, a band of members in the Lower House was now organised as what was truly to be called His Majesty's Opposition. With steady perseverance and tenacity the passage of the Remonstrance was disputed clause by clause during a seven days' debate. Only the most watchful and resolute determination on the part of the popular leaders availed to maintain any part of it unimpaired; and all the forms of the House were exhausted in pretences for delay. At length the final debate was fixed for November 22. The

The Grand Remonstrance laid on the table of the House.

Organised court opposition to it.

(*l*) Though doubtless in no way connected with the original rising, the king had been in negotiation with the Irish, through his agent, Lord Glamorgan (who was empowered to treat with them without the knowledge of Ormond, the lord lieutenant), for help against his parliament. On the Irish rebellion, see J. McDonnell, The Ulster Civil War of 1641 (Dublin, 1879).

(*m*) Forster, Grand Remonstrance, p. 210.

king, eager at last to reach London before the final vote could be taken, was now hastening with all speed back from Edinburgh, and on the eventful 22nd was only distant two days' journey from the metropolis. For fourteen hours the debate was sustained with much warmth by Hyde, Falkland, Dering, Rudyard, Bagshaw, Culpeper, Pym, Orlando, Bridgman, Waller, Hampden, Holles, Glyn, Coventry, Geoffrey Palmer and Maynard. Near midnight Secretary Nicholas retired, and wrote to the king that the commons had been in debate since twelve at noon and were at it still, it being then near twelve at midnight. "I stayed this despatch," he continued, "in hopes to have sent your Majesty the result of that debate, but it is so late, as I dare not (after my sickness) adventure to watch any longer to see the issue of it: only I assure your Majesty there are divers in the Commons House that are resolved to stand very stiff for rejecting that Declaration, *and if they prevail not then to protest against it.*"

The Remonstrance carried by 11 votes.

At length about two in the morning, the Remonstrance was carried by a majority of eleven only. So critical was the contest deemed, that Cromwell declared to Lord Falkland, as they were leaving the House together after the division: "Had the Remonstrance been rejected, I would to-morrow have sold everything I possess, and never seen England more; and I know many other honest men of the same resolution."

What the Grand Remonstrance was.

The nature and design of this memorable constitutional document, the most complete justification of the Great Rebellion, may be concisely described in the words of Mr. Forster, as, "in brief an appeal to the country; consisting, on the one hand, of a dignified assertion of the power of the House of Commons in re-establishing the public liberties, and, on the other, of an urgent representation of its powerlessness either to protect the future or save the past, without immediate present support against papists and their favourers in the House of Lords, and their unscrupulous partisans near the throne. There is in it, nevertheless, not a word of disrespect to the person or the just privileges of royalty; and nothing that the fair supporters of a sound church establishment might not frankly have approved and accepted. Of all the state papers of the period, it is in

these points much the most remarkable; nor, without very careful reading it, is it easy to understand rightly, or with any exactness, either the issue challenged by the king when he unfurled his standard, or the objects and desires of the men who led the House of Commons up to the actual breaking out of the war" (*n*).

The preamble.

The preamble, consisting of twenty unnumbered clauses, and opening in the name of "The Commons in the present Parliament assembled," begins by declaring that for the past twelve months they had been carrying on a struggle of which the object was to restore and establish the ancient honour, greatness, and security of the nation and the crown that the object of the Remonstrance was as well to answer the great aspersions cast upon what they had done, as to point out what remained to do, and the difficulties raised for their hindrance. In express terms they denounce the court conspiracy to subvert the fundamental laws and principles of government, to degrade the protestant religion, to discredit the claims and authority of parliament, and to introduce such opinions and ceremonies as would necessarily end in accommodation with popery.

Proofs and illustrations.

The body of the Remonstrance is contained in 206 numbered clauses (each clause, as we have seen, having been separately voted by the House), and takes the form of practical proofs and illustrations of the statements advanced in the preamble.

After detailing, with vigorous and incisive rhetoric, all the invidious and tyrannical proceedings of the king during his first, second, and third parliaments, the government by prerogative from the third parliament to the pacification of Berwick, the Short Parliament and the Scottish invasion, the remedial Acts of the Long Parliament, and the practices of the court party, the Remonstrance proceeds to set forth the defence of the popular leaders.

Defence of the leaders of the commons.

"What hope," they said, "have we now but in God? The only means of our subsistence, and power of reformation, is, under Him, in the parliament; but what can we, the commons, do, without the conjunction of the House of Lords? And what conjunction can we expect there, when

(*n*) Grand Remonstrance, pp. 11 [5-16], 215 *seq.*

the bishops and the recusant lords are so numerous and prevalent, that they are able to cross and interrupt our best endeavours for reformation, and by that means give advantage to this malignant party to traduce our proceedings?

"They infuse into the people that we mean to abolish all church government, and leave every man to his own fancy for the service and worship of God, absolving him of that obedience which he owes, under God, to his Majesty; whom we know indeed to be entrusted with the ecclesiastical law as well as with the temporal, to regulate all the members of the Church of England though by such rules of order and discipline only as are established by parliament; which is his great council in all affairs, both in church and state.

Their attitude towards the church.

"They have strained to blast our proceedings in parliament by wresting the interpretations of our orders from their genuine intentions. They tell the people that our meddling with the power of episcopacy hath caused sectaries and conventicles, when it is idolatry, and the popish ceremonies introduced into the church by command of the bishops, which have not only debarred the people from them but expelled them from the kingdom. And thus, with Eliab, we are called by this malignant party the troublers of the state; and still, while we endeavour to reform their abuses, they make us authors of those mischiefs we study to prevent.

"We confess our intention is, and our endeavours have been, to reduce within bounds that exorbitant power which the prelates have assumed unto themselves, so contrary both to the word of God and to the laws of the land: to which end we passed the bill for the removing them from their temporal power and employments, that so the better they might with meekness apply themselves to the discharge of their functions; which bill they themselves opposed, and were the principal instruments of crossing (*o*).

(*o*) Three bills were introduced by the commons for taking away the temporal power of the bishops. The first, "A Bill to restrain Bishops and others in Holy Orders from intermeddling in secular affairs," was sent up to the lords, May 1, 1641, where it was thrown out by a large majority. The second, popularly termed the "Root and Branch Bill," was intituled "For the utter abolishing and taking away all archbishops, bishops, their chancellors and commissaries, deans and chapters, archdeacons, prebendaries, chanters, canons, and all other their under-officers." It was introduced by

"And we do here declare that it is far from our purpose or desire to let loose the golden reins of discipline and government in the church, leaving private persons, or particular congregations, to take up what form of divine service they please: for we hold it requisite that there should be, throughout the whole realm, a conformity to that order which the laws enjoin according to the Word of God. But we desire to unburthen the consciences of men of needless and superstitious ceremonies, to suppress innovations, and to take away the monuments of idolatry."

They then suggest a general synod of divines, the result of whose consultations should be represented to the parliament, there to be allowed of and confirmed, and to receive the stamp of authority.

Desire to advance learning.

"We have been maliciously charged," they continue, "with the intention to destroy and discourage learning, whereas it is our chiefest care and desire to advance it, and to provide such competent maintenance for conscientious and preaching ministers throughout the realm as will be a great encouragement to scholars, and a certain means whereby the want, meanness and ignorance, to which a great part of the clergy is now subject, will be prevented. And we have intended likewise to reform and purge the fountains of learning, the two universities, that the streams flowing from thence may be clear and pure, and an honour and comfort to the whole land."

Remedial measures demanded.

Finally, the Remonstrance specifies the remedial measures demanded: "the groundwork of which," remarks Mr. Forster, "was precisely that which formed afterwards the basis of the settlement by which alone the monarchy was again firmly established in England."

(1) Safeguards against Roman Catholicism.

(1) To keep papists in such condition, as that they might not be able to do any hurt; and for avoiding such connivance and favour as had theretofore been shown to them, his Majesty was moved to grant a standing commission to some choice men named in parliament who might take

Sir Edward Dering while the first bill was still pending, but after being long and vehemently debated, was allowed to drop on the king's departure for Scotland. The third, which passed into a law in Feb. 1641-1642 (*supra*, p. 561), was the last concession made by Charles before finally quitting London with the intention of appealing to arms.

watch of their increase, report upon their counsels and proceedings, and use all due means, by execution of the laws, to prevent mischievous designs, from that quarter, against the peace and safety of the realm. And further, that some sufficient tests should be applied to discover the false conformity of papists to the English Church, by colour of which they had been admitted into places of highest authority and trust.

(2) Securities for administration of laws.

(2) That, for the better preservation of the liberties and laws, all illegal grievances and exactions should be presented and punished at the sessions and assizes: and that judges and justices should be sworn to the due execution of the Petition of Right and other laws.

(3) Protection against evil councillors.

(3) A series of precautions were suggested to prevent the employment of evil councillors; and it was plainly stated that supplies for the support of the king's own estate could not be given, nor such assistance provided as the times required for the protestant party beyond the sea, unless only such councillors, ambassadors, and other ministers were in future employed as parliament could give its confidence to; and unless all councillors of state were sworn, as well to avoid receiving, in any form, reward or pension from any foreign prince, as to observe strictly those laws which concerned the subject at home in his liberty.

"If these things," the Remonstrance concludes, "be observed, we doubt not but God will crown this parliament with such success, as shall be the beginning and foundation of more honour and happiness to his Majesty, than ever was yet enjoyed by any one of his royal predecessors" (*p*).

Motion to print the Remonstrance.

Immediately after the Remonstrance had been voted, Mr. Peard, member for Barnstaple, moved that it should be forthwith printed. Hyde opposed the design as unlawful and mischievous, and in pursuance of the tactics already decided upon, said that if the motion were adopted, he should ask leave of the House to protest. Other voices cried out that they protested, and Mr. Palmer declared, "I protest for myself and all the rest." Protests, though in use

(*p*) The Remonstrance is printed *in extenso* in Rushworth's Collection, part 3, i. 438. For a just apprehension of its real nature and importance, Forster's Grand Remonstrance, 1641 (from which the particulars in the text are mainly drawn), should be carefully studied.

with the lords, were utterly unknown to the commons, and the presumption of Palmer, not merely in protesting at all without leave of the House, but also in the name of "all the rest," raised such a tumult that many members laid their hands upon their swords, and a violent conflict seemed imminent, "had not the sagacity and calmness of Mr. Hampden," says an eye-witness, "by a short speech prevented it." On a division it was decided by a majority of twenty-three that although the Remonstrance might be published, it should not be printed until the further order of the House.

The question whether the minority should be allowed to protest against a decision of the House of Commons was far too serious to admit of Palmer's offence being passed over unpunished. It was of vital importance to the authority and influence of the commons that, no matter what their internal divisions might be, their decisions should be kept before the people sole and intact. "Palmer's success would have divided the House against itself. Once admit such division, all the votes of the past year would lose their claim to continued respect, and the sovereign would again be uncontrolled" (*q*). At the next sitting of the House, Palmer, after being heard in his defence, was committed to the Tower, but almost immediately afterwards released, on making a humble apology and retractation. On December 15 (1641), the Remonstrance, having been previously presented to the king, was ordered to be printed by a majority of 135 votes to 83.

Impeachment and attempted arrest of the Five Members.

The next important, and indeed the critical, event in the relations between Charles I. and his parliament was the impeachment and the attempted arrest of the Five Members. The king had no intention of submitting quietly to the adverse vote of the House of Commons. He once more, indeed, even with what he afterwards alleged to be the proofs of treason in his hands, attempted to make use of what Clarendon has termed "the stratagem of winning men by places" (*r*), by offering the chancellorship of the exchequer to Pym, the leader of the popular party (*s*). But

(*q*) Forster, Grand Remonstrance, p. 347.
(*r*) Clarendon, Hist., ii. 60.
(*s*) Forster, Arrest of the Five Members, p. 59.

this attempt at conciliation failed, like the former, doubtless on account of the utter distrust and disbelief which the king in all his dealings had inspired. Charles now seems to have resumed his original intention to crush his opponents. The leaders of the opposition to the Remonstrance were called to office. Hyde preferred for the present to serve the king as a private member of the House, but Falkland accepted the post of secretary of state, and Culpeper that of chancellor of the exchequer. Balfour, the tried friend of the parliament, was removed from the governorship of the Tower—the "bridle" of the City—and Colonel Lunsford, a soldier of evil character and infamous name, was appointed in his place, "as one," says Clarendon, "who would be faithful for the obligation, and execute anything desired or directed." The appointment of Lunsford excited tumults in the City and at Westminster. The commons demanded his removal, and at length the king was obliged to give way, appointing Sir John Byron in his stead. Disturbed by secret reports, and the unusual concourse of armed men about the king at Whitehall, the commons sought the protection of a guard. On December 30, Pym (who seems to have already received intimation of the intended impeachment) moved "that there being a design to be executed this day upon the House of Commons, we might send instantly to the City of London . . . to come down with the train bands for our assistance." The next day the commons sent a verbal message to the king by Denzil Holles, expressing their earnest desire for a guard out of the City, under command of the Earl of Essex. The king required the message to be communicated to him in writing. This was immediately drawn up and presented, but no answer was returned for three days. At length, on January 3, 1641-1642, the king's answer came. It was a refusal, but accompanied by a promise "on the word of a king, that the security of all and every one of you from violence, is and shall ever be as much our care as the preservation of us and our children." At that very time the attorney-general was engaged in delivering a royal message to the House of Lords, impeaching for high treason Lord Kimbolton and five members of the commons, Pym, Hamp-

den, Holles, Haslerig, and Strode (*t*). He demanded that the House should secure the persons of the accused and appoint a committee to examine the charges. The lords, "appalled" (to quote Clarendon's expression) at this proceeding, at once raised the question of the illegality of the accusation, and disregarding the king's request, sent an immediate message to the commons and named members for a conference. In the meantime the king's officers had gone to the houses of the Five Members and were putting seals on everything found there. The commons, having just heard of these proceedings, had voted them a breach of privilege, when the king's serjeant appeared, and in the name of his master "required Mr. Speaker to place in his custody five gentlemen, members of this House (naming them), whom his Majesty had commanded him to arrest for high treason." The House appointed a committee, including two ministers of the crown, Lord Falkland and Sir John Culpeper, to attend on and inform the king that such an important message could only be answered after mature consideration, but that the accused would be ready to answer any *legal* charge made against them. The Five Members

Articles of impeachment against the Five Members.

(*t*) A copy of the charge, indorsed in the handwriting of Secretary Nicholas as "Articles of treason against Mr. Pym and the rest," exists among the State Papers, and is printed in Forster's Arrest of the Five Members (p. 114) as follows: "Articles of High Treason and other high misdemeanours agt the Lord Kemolton, Mr John Pym, Mr John Hampden, Mr Denzil Hollis, Sir Arthr Haslericke, and Mr Wm Strode.

"1. That they have traytorously endeavrd to subvert the fundamentall Lawes and Govnt of the Kingdome of England, to deprive ye King of his royale power, and to place in subjects an arbitrary and tyrannicall power over the lives, libertyes, and estates of his Majts lovinge people.

"2. That they have traytorously endeavd by many fowle aspersions upon his Matie and his Governt, to alienate the affections of his people, and to make his Matie odious unto them.

"3. That they have endeavd to drawe his Mts late armye to disobedience to his Maties comands, and to syde with them in their traytorous designs.

"4. That they have traytorously invited and incouraged a forreigne power to invade his Mties kingdome of England.

"5. That they have traytorously endeavd to subvert the rights and very being of Parlts.

"6. That for the compleating of their traytorous designs, they have endeavrd, as farr as in them lay, by force and terror to compell the Parlamt to joyne with them in theire traytorous Designs, and to that end have actually raysed and countenanced tumults agt ye King and Parlamt.

"7. That they have traytorously conspired to levie, and actually have levyed warr agt the King." (Referring to the armed guard which they had persisted in voting for the protection of the House.)

were ordered to attend daily in their places, and the previous resolution for a military guard out of the City was turned into an Order of the House and sent by the hands of two of the members for the City to the Lord Mayor.

Illegality of the impeachment.

Of this impeachment Macaulay has remarked: "It is difficult to find in the whole history of England such an instance of tyranny, perfidy, and folly. The most precious and ancient rights of the subject were violated by this act. The only way in which Hampden and Pym could legally be tried for treason at the suit of the king was by a petty jury on a bill found by a grand jury. The attorney-general had no right to impeach them. The House of Lords had no right to try them. . . . The tyrant resolved to follow up one outrage by another. In making the charge he had struck at the institution of juries. In executing the arrest, he struck at the privileges of parliament. He resolved to go to the House in person with an armed force, and there to seize the leaders of the opposition while engaged in the discharge of their parliamentary duties" (*u*).

Preparations for the arrest.

Careful preparations were made to ensure the success of this *coup d'état*. Whitehall was fortified with a considerable accession of arms and ammunition, and the palace guards were ordered to hold themselves in readiness. Sir William Killigrew was sent round to each of the Inns of Court (collectively capable of furnishing a military guard of at least 500 men) with copies of the articles of treason, and with a summons from his Majesty in each case to be in waiting the next morning at Whitehall. Late in the night the king, after consultation with his secretary, Nicholas, sent instructions to the Lord Mayor of London not merely to refuse to the commons the guard which they had requested, but in its place to enrol such a guard for the royal service, with orders for its immediate employment in suppressing and dispersing all tumults and assemblages of the people in the streets of the City, and with express instructions, "by shooting with bullets, or otherwayes, to suppresse those tumults and destroy such of them as shall persist in their tumultuous wayes and disorders" (*w*).

(*u*) Macaulay (Nugent's Memorials of Hampden).
(*w*) Forster, Arrest of the Five Members, 154-157.

The next morning, January 4 (1641-1642), the accused members attended in their places, and in a Grand Committee of the House defended themselves from the charges which the king had brought against them. Pym, admitting that the articles, if proved, amounted to high treason, proceeded to clear himself by drawing a parallel between his actions and the articles. "If," he said, "to vote with the parliament, as a member of the House, wherein all our votes ought to be free, be to endeavour to subvert the fundamental laws, then I am guilty of the first article. If to agree and consent by vote with the whole state of the kingdom, to ordain and make laws for the good government of the king's subjects, in peace and dutiful obedience to their lawful sovereign, be to introduce an arbitrary and tyrannical government, then I am guilty of the second article. If to consent, by vote with the parliament, to raise a guard or trained band to secure and defend the persons of the members, environed and beset with many dangers in the absence of the king; and to vote with the House, in obedience to the king's command, at his return, be actually to levy arms against the king, then I am guilty of the third article. If to join with the parliament of England, by free vote, to crave brotherly assistance from Scotland to suppress the rebellion in Ireland, be to invite and encourage a foreign power to invade the kingdom, then I am guilty of high treason by the fourth article. If to agree with the greatest and wisest council of state, to suppress unlawful tumults and riotous assemblies—to agree with the House, by vote, to all orders, edicts, and declarations for their repelling,—be to raise and countenance them in their unlawful actions, then am I guilty of the fifth article. If by free vote to join with the parliament in publishing of a Remonstrance, in setting forth declarations against delinquents in the state, against incendiaries against his Majesty and his kingdom, against ill counsellors which labour to avert the king's affections from parliament—against those ill-affected bishops that have innovated our religion, oppressed painful, learned, and godly ministers with vexatious suits and molestations in their unjust courts; by cruel sentences of pillory and cutting off their ears; by great fines, banishments and perpetual imprisonments;—if this

Pym's speech in answer to the charge.

be to cast aspersions upon his Majesty and his government, and to alienate the hearts of his loyal subjects, good protestants and well-affected in religion, from their due obedience to his royal Majesty, then I am guilty of the sixth article. If to consent, by vote with the parliament, to put forth proclamations, or to send declarations to his Majesty's army, to animate and encourage them to his loyal obedience, to give so many subsidies, and raise so many great sums of money willingly, for their keeping on foot, to serve the king upon his royal command, on any occasion; to apprehend and attack as delinquents such persons in the same as were disaffected both to his sacred person, his crown and dignity, to his wise and great council of parliament, to the true and orthodox doctrine of the Church of England, and to the true religion grounded on the doctrine of Christ himself, and established and confirmed by many Acts of Parliament in the reigns of Henry VIII., Edward VI., Elizabeth, and James,—if these be to draw his Majesty's army into disobedience and to side with us in our dangers, then am I guilty of the seventh article" (*x*).

The impeachment voted "a scandalous paper."

When the last of the accused members had resumed his seat, the commons resolved to request a conference with the lords to acquaint them that "a scandalous paper" (the articles of impeachment) had been published, and to require their help in instituting inquiries as to who were its authors and publishers, to the end that they might receive condign punishment, and the commonwealth be secured against such persons (*y*).

Attempted arrest by the king and an armed force.

Forewarned of the king's approach at the head of 400 or 500 armed men, the accused members, by the desire of the House, discreetly withdrew as the king was entering New Palace Yard.

At the entrance to Westminster Hall the king's armed band formed suddenly into a lane, ranging themselves on either side along the whole length of the Hall, and Charles, passing through this lane, ascended the stairs leading to

(*x*) The order in which the articles are enumerated by Pym does not correspond with the copy existing in the handwriting of Secretary Nicholas (*supra*, p. 573, note). The latter was probably only a draft, which was re-arranged before formal presentation.

(*y*) Forster, Arrest of the Five Members, p. 172.

the House of Commons. "The king's command had been, according to Sir Ralph Verney and Captain Slingsby, himself one of the company, that the great body should stay in the Hall: but, says D'Ewes, 'his Majesty coming into the lobby, a little room just without the House of Commons, divers officers of the late army of the north, and other desperate ruffians, pressed in after him to the number of about fourscore, besides some of his pensioners.'" Charles entered the House followed only by his nephew, the Elector Palatine, having commanded the rest of his followers "upon their lives not to come in"; but the door was not permitted to be closed behind him. "Visible now at the threshold to all, were the officers and desperadoes above named, of whom D'Ewes proceeds, 'some had left their cloaks in the Hall, and most of them were armed with pistols and swords, and they forcibly kept the door of the House of Commons open, one Captain Hide standing next the door holding his sword upright in the scabbard'; a picture which Sir Ralph Verney, who was present that day in his place, completes by adding that 'so the doors were kept open, and the Earl of Roxborough stood within the door, leaning upon it.' As the king entered all the members rose and uncovered, and the king also removed his hat, and it would not have been easy, says Rushworth, to discern any of the Five Members had they been there, among so many bare faces standing up together. But there was one face among the Five, which Charles knew too well not to have singled out even there: and hardly had he appeared within the chamber, when it was observed that his glance and his step were turned in the direction of Pym's seat close by the bar. His intention, baffled by the absence of the popular leader, can only now be guessed at; but Rushworth adds, 'his Majesty not seeing Mr. Pym there, knowing him well, went up to the chair.' As he approached the chair, Lenthall stepped out to meet him; upon which 'he first spake,' says D'Ewes, saying, 'Mr. Speaker, I must for a time make bold with your chair.' And then the king stepped up to his place and stood upon the step, but sat not down in the chair. And after he had looked a great while he spoke again. 'Gentlemen,' he said, 'I am sorry for this occasion of coming unto you.

The king's speech.

Yesterday I sent a serjeant-at-arms upon a very important occasion to apprehend some that by my command were accused of high treason; thereunto I did expect obedience, and not a message. And I must declare unto you here, that albeit no king that ever was in England shall be more careful of your privileges, to maintain them to the uttermost of his power than I shall be, yet you must know that in cases of treason no person hath a privilege. And therefore I am come to know if any of these persons that were accused are here.' Then he paused; and casting his eyes upon all the members of the House, said, 'I do not see any of them. I think I should know them.' 'For I must tell you, gentlemen,' he resumed, after another pause, 'that so long as those persons that I have accused (for no slight crime, but for treason) are here, I cannot expect that this House will be in the right way that I do heartily wish it. Therefore I am come to tell you that I must have them wheresoever I find them.' Then again he hesitated, stopped, and called out, 'Is Mr. Pym here?' To which nobody gave answer. 'He then asked (continues D'Ewes) for Mr. Hollis, whether he were present, and when nobody answered him, he pressed the Speaker to tell him, who, kneeling down, did very wisely desire his Majesty to pardon him, saying that he could neither see nor speak but by command of the House: to which the king answered 'Well, well; 'tis no matter. I think my eyes are as good as another's.' And then he looked round about the House a pretty while to see if he could espie any of them.'' After that long pause described by D'Ewes, "the dreadful silence," as one member called it, Charles spoke again to the crowd of mute and sullen faces. The complete failure of his scheme was now accomplished, and all its possible consequences, all the suspicions and retaliations to which it had laid him open, appear to have rushed upon his mind. "'Well, since I see all my birds are flown, I do expect from you that you will send them unto me as soon as they return hither. But, I assure you, on the word of a king, I never did intend any force, but shall proceed against them in a legal and fair way, for I never meant any other. And now, since I see I cannot do what I came for, I think this no unfit occasion to repeat what I have said formerly,

that whatsoever I have done in favour and to the good of my subjects, I do mean to maintain it. I will trouble you no more, but tell you I do expect, as soon as they come to the House, you will send them to me; otherwise I must take my own course to find them.' 'After he had ended his speech,' continues D'Ewes, 'he went out of the House in a more discontented and angry passion than he came in, going out again between myself and the south end of the clerk's table, and the Prince Elector after him.' Low mutterings of fierce discontent broke out as he passed along, and 'many members cried out aloud, so as he might hear them, *Privilege! Privilege!*' With those words, ominous of ill, ringing in his ear, he repassed to his palace through the lane, again formed, of his armed adherents, and amid audible shouts of as evil augury from desperadoes disappointed of their prey. Eagerly in that lobby had the word been awaited for, which must have been the prelude to a terrible scene. 'For the design was,' pursues Sir Simonds D'Ewes, writing at the close of his day's journal, 'to have taken out of our House by force and violence the said five members, if we had refused to have delivered them up peacefully and willingly; which, for the preservation of the privileges of our House, we must have refused. And in the taking of them away, they were to have set upon us all, if we had resisted, in a hostile manner. It is very true that the plot was so contrived as that the king should have withdrawn out of the House, and passed through the lobby or little room next without it, before the massacre should have begun, upon a watchword by him to have been given upon his passing through them. But 'tis most likely that those ruffians, being about eighty in number, who were gotten into the said lobby, being armed all of them with swords, and some of them with pistols ready charged, were so thirsty after innocent blood as they would scarce have stayed the watchword, if those members had been there; but would have begun their violence as soon as they had understood of our denial, to the hazard of the persons of the King and the Prince Elector, as well as of us. For, one of them understanding a little before the king came out that those

Design of the attempted arrest.

five gentlemen were absent, 'Zounds!' said he, 'they are gone! and we are never the better for our coming!'" (*z*).

Its critical nature.

"The arrest of the five members," observes Mr. Forster, "was the final stage of the struggle against the Grand Remonstrance. It was a violent effort to reverse the eleven votes by which the victory was achieved, and to constitute the leaders of the minority to whom the highest offices in the state had meanwhile been given, masters of the House of Commons. When Charles and his armed attendants passed through the lobby of the House of Commons on January 4, the Civil War had substantially begun. Clarendon himself admits as much when he calls it 'the most visible introduction to all the misery that afterwards befel the king and kingdom'" (*a*).

Question of the militia.

The immediate question upon which the quarrel between king and parliament ultimately turned was the command of the militia. Ireland was in a state of rebellion, and a large army was absolutely necessary to reduce that kingdom to obedience. Justly persuaded of the utter insincerity of the king, and with the evidence before them of his intention to win back his authority at the sword's point, it would have been suicidal on the part of the commons to place in the king's hands a military force which might, and probably would, have been used for their own overthrow. The bill for regulating the militia presented to the king in February, 1642, by which persons to be nominated by the commons were to be entrusted with authority over the militia of the kingdom, was an undoubted encroachment upon the king's legal prerogative, unjustifiable perhaps as a permanent measure, but temporarily necessary and salutary in the crisis which the king himself had provoked. "When this bill," says Clarendon, "had been with much ado accepted, and first read, there were few men who imagined that it would ever receive further countenance; but now there were very few who did not believe it to be a very necessary provision for the peace and safety of the kingdom. So great an impression had the late proceedings made upon them,

(*z*) Forster, Arrest of the Five Members, pp. 184, 200.

(*a*) Forster, Arrest of the Five Members, pp. 376, 377. "The attempt to seize the Five Members was undoubtedly the real cause of the war."—Macaulay (Essay on Hallam's Const. Hist., Essays, 1862, i. 149).

that with little opposition it passed the commons, and was sent up to the lords" (*b*). The king's resolute refusal to pass the bill led by rapid steps to the Civil War.

The constitutional period of the great contest between the king and the parliament may be said to have ended with the attempted arrest of the Five Members.

The Revolutionary period. 1642-1660.

The revolutionary period between 1642 and the restoration of Charles II. in 1660—highly interesting and instructive to the student of political history, but not strictly belonging to a work designed as a concise relation of the progress of the English constitution—must necessarily be here passed over briefly. Within three years from the day when Charles raised the royal standard at Nottingham (August 22, 1642), the Civil War was practically concluded. The crushing defeat of the king at Naseby (June 14, 1645) by the "New Model" army under Fairfax and Cromwell, followed by the rout of Montrose's forces at Philiphaugh (September 13, 1645), reduced Charles to the position of a fugitive in his own kingdom, and made a frank acceptance of the least onerous terms which, after a fair negotiation, he could obtain from his victorious people, the only means by which he could ever regain the exercise of his regal functions. The submission of English kings to the will of their people was no new thing in the history of the constitution. Even Edward I., the greatest of the Plantagenets, had found it necessary to yield, and had yielded with loyalty and good faith. But the principle of conduct by which Charles was guided was the very opposite of that which the great Edward proclaimed in his motto "Pactum Serva." Defeated in the field, he betook himself to intrigue and double-dealing, in the hope that by fomenting discord between the Scots and the English, between the parliament and the army, and by dexterously playing off one against the other, he might ultimately regain the enjoyment of despotic power.

Religious difficulty.

The great difficulty was the religious one. Laud and Charles had endeavoured to establish a rigid ceremonial uniformity: the parliament and the "Westminster

(*b*) Clarendon, Hist., ii. 180.

Assembly" of divines (constituted June 12, 1643) had substituted an equally rigid uniformity of narrow calvinistic dogma; the adoption of the "Solemn League and Covenant" by the English parliament (September 25, 1643) had been exacted by the Scots as an indispensable preliminary to the aid which they rendered during the contest, and the maintenance of the presbyterian system in England was still with them an object of paramount importance. On the other hand, the victorious army of Fairfax and Cromwell, though composed of men of widely differing views on religious matters, were agreed, as a body, in protesting against the refusal of toleration by both episcopalians and presbyterians alike, and in a determination to secure for themselves, and for all others, except the Roman catholics, religious freedom of thought and of speech.

After nearly three years of intermittent negotiation, when at length there seemed to be a possibility of an agreement with both army and parliament, on the basis of a presbyterian establishment for three years combined with a moderate measure of toleration, the king, in the midst of the negotiations at Newport, entered into a secret treaty with the Scots, binding himself to maintain the presbyterian worship in England for three years and to suppress all other sects. In return, the Scots were to provide an army to replace him on the throne. In anticipation of the promised aid, the English royalists rose in various parts of the country, and on July 5, 1648, a Scottish royalist army entered England under the command of the Duke of Hamilton. The English army, under Cromwell and Fairfax, promptly took the field; and the total defeat of Hamilton's forces near Preston on August 17, followed by the surrender of Colchester, after a sharp siege, on the 27th of the same month, brought the second Civil War to a speedy close. Charles now returned to his old strategy of delusive negotiations with the parliament; but for the army, exasperated by the king's conduct and flushed with victory, the day of negotiation had passed (*c*). To the

The Engagement, 1648.

(*c*) It was Charles's ineradicable duplicity which caused all efforts at accommodation to fail. Even moderate men were oppressed with the feeling of utter distrust which his conduct inspired. In a curious pamphlet (preserved in the British Museum) entitled "Ten Necessary Quæries

fanatic belief of Charles in his divine right to govern the nation as to him seemed best, was at length opposed the equally fanatic belief of a bible-reading soldiery that it was their duty to see that "Charles Stuart, the capital and grand author of all the troubles and woes that the kingdom had endured, should be speedily brought to justice, for the treason, blood, and mischief of which he had been guilty."

Even before the illegal trial and execution of "Charles Stuart, King of England" (January 30, 1648-1649), the reins of government had passed alike from king, lords and commons, into the firm grasp of the leaders of the army. After the "purging" of the House of Commons by Colonel Pride, the remnant, about fifty members in all, became a mere instrument for carrying out the will of the soldiery. When the few peers who still continued to meet as the House of Lords refused to concur in bringing the king to trial, the truncated Lower House had assumed supreme authority by voting (January 4) that the people being, after God, the source of all legitimate power, the sovereign power in England resided in the commons who had been elected by and represented the people.

Pride's Purge. Dec. 5, 1648.

After the decapitation of the king, the House of Lords was within a few days voted "useless and dangerous," the kingship abolished as "unnecessary, burthensome, and dangerous," and the old constitutional form of government gave place to the Commonwealth of England. At first, while the "Rump" House of Commons continued to exercise the functions of a parliament, the executive power was vested in a Council of State, consisting of forty-one persons, partly parliamentary, partly military. But the genius of Cromwell as a born "ruler of men," not less than the brilliant series of his military victories, culminating in the "crowning mercy" of Worcester, soon caused the real executive power to be concentrated in his hands, even before it had been formally conferred upon him, with the title of "Lord Protector," by the Instrument of Govern-

Changes effected.

touching the personall Treatie. Very useful and necessary to be considered. By James Taswell, a true lover of King, Parliament, Truth, and Peace. London: Printed by R. I. for A. H. 1648." the working of this feeling is well brought out.

ment (December 16, 1653) (*d*). There seems no reason to doubt that Cromwell aimed at establishing a form of government in which the nation would be ruled by the will of its elected representatives in parliament, and under which all men (the Roman catholic as yet excepted) should possess the great boon of religious freedom. But in practice he failed to carry out his ideal. Toleration was only partially conceded; and while the government was in form a republic, it was in truth "a despotism, moderated only by the wisdom, the sobriety, and the magnanimity of the despot" (*e*). Justice between man and man seems to have been administered as fairly as, if not more fairly than, under the monarchy, but between the government and the subject arbitrary rule prevailed. After the royalist rising at Salisbury (March 1655), when the judges on circuit were seized and even threatened with hanging, the country was mapped out into military districts, under the command of major-generals, by whom every insurrectionary movement was immediately suppressed and punished. The death of Cromwell (September 3, 1658), and the weakness of his son and successor in the Protectorate, exposed the nation to the danger of being ruled by a succession of petty military despots; and almost all parties, postponing their differences, political and religious welcomed back the Stuart dynasty and the old civil polity of the kingdom.

Results of the Revolutionary period.

But although the legal constitution had been suspended during this period, and revived again at the accession of Charles II., the Great Rebellion of the English nation could not fail to produce certain permanent political and

(*d*) [E. Jenks, The Constitution Experiments of the Commonwealth (Camb. 1890), asserts that the ordinances of the Instrument of Government as affecting the parliamentary election of Dec. 16, 1653, represent down to the Reform Bill of 1832 the sole attempt, actually carried out, at a general reform of the parliamentary franchise.—As a matter of fact, the fundamental principle of this reform is very similar to that of the Reform Bill of 1832. The number of enfranchised boroughs was to be decreased, the number of county members increased, and the franchise itself attached to fixed and definite qualifications. The Union of England and Ireland was under Cromwell a *fait accompli*. The protectorate approached, moreover, nearer to religious tolerance than had or did any responsible government for a long time either before or after.—Ed.]

(*e*) Macaulay, Hist., i. 137.

constitutional results (*f*). These may be summed up under the following heads:

Cause of absolute monarchy lost.

(1) Although the cause of monarchy was gained, that of *absolute* monarchy was lost for ever. Henceforth royalists and revolutionists alike regarded the close union and mutual interdependence of kings and parliaments as necessary for the good government of the country.

Predominant influence of House of Commons established.

(2) The predominant influence of the House of Commons in the government of the nation was permanently established, and has ever since been growing more and more marked and decisive. The overthrow of the crown and the House of Lords had been so violent and complete, that the unqualified restoration of their rights and dignity failed to reinstate them in their ancient ascendancy. The royalist House of Commons of Charles II., in its relations to the crown and the administration of the country, inherited, defended, and transmitted to its successors the conquests of the Long Parliament (*g*).

Rejection of romanism.

(3) The complete and definitive rejection of romanism in England was assured; but the position of the national

(*f*) "Of course, in seeming, Cromwell's work died with him; his dynasty was rejected, his republic cast aside; but the spirit which culminated in him never sank again, never ceased to be a potent, though often a latent and volcanic, force in the country. Charles II. said that he would never go again on his travels, for anything or anybody; and he well knew that though the men whom he met at Worcester might be dead, still the spirit which warmed them was alive and young in others."—Bagehot, Eng. Const. (2nd edit.), p. 282. [Jenks, the Constitution Experiments of the Commonwealth, combats the theory of Gneist, and indeed, the prevailing idea that the English Commonwealth was totally unfruitful in regard to the development of the Constitution. The Long Parliament, the author avers, drew all state business to itself, and through the medium of its numerous parliamentary committees, actually exercised the supreme power within the realm. Moreover, he maintains that the traditions of this epoch, which never died out, principally explain the ease with which, at the commencement of the 18th century, the transition to the parliamentary form of government was effected.

In this connection it has been observed, that the significance of the Commonwealth consists before all else in the fact that England for the first time in its history showed the world what a strong resolute government, freed from the fetters of the mediæval parliamentary state, and a government which, in respect of broad views and absence of prejudice was far in advance of its time, could achieve both without and within. For the attempts of the Commonwealth to form a constitution, *vide* Gneist, Hist. Engl. Const., p. 576, and note to p. 579; and E. Jenks, Hist. of the Rump Parliament, chap. 2.—Ed.]

(*g*) See *infra*, pp. 595 *seq.*

church after the Restoration was no longer precisely the same as before the Rebellion. Down to the time of the Commonwealth the church had never ceased, in legal theory and to a great extent in actual fact, to be co-extensive with the nation. At its deliberate and formal re-establishment by Charles II. and his parliament it was patently the church not of the whole nation but of a majority only. Thenceforward, as the other religious communities have gradually attained first to toleration and then to civil equality with the members of the national church, the ecclesiastical constitution, whilst still in theory national, has gradually come to be regarded not so much as the national church (which legally it still continues to be), [but] as the "Established" Church, using the word "established" in its modern signification, as denoting a religious body standing in a special relation to the state in contradistinction from all other religious bodies (*h*).

Antipathy to standing armies.

(4) Another important result of the revolutionary crisis through which the nation had passed was the development of an intense national antipathy to a standing army, and of a widespread distrust of men of extreme views.

(*h*) See Guizot, English Revolution; and Freeman, Disestablishment and Disendowment.

[See also Gneist, Hist. Eng. Const., cap. xxxviii. p. 536, "The Conflict of the *Jure Divino* Monarchy with the Estates," and particularly on the contrasts between the state church and the Roman Catholic Church.—Ed.]

CHAPTER XV.

THE STUART PERIOD.

III. FROM THE RESTORATION TO THE BILL OF RIGHTS (1660—1689).

CHARLES II. 1660-1685.

The reign of Charles II. (*a*) has been epigrammatically described as the "era of good laws and bad government"; (*b*) but whilst the bad government was continuous, the good laws appeared only at intervals amidst many others of a violent and questionable character. We shall briefly consider the principal statutes of constitutional importance.

Abolition of military tenures.

During the Commonwealth the vexatious emoluments derived from the military tenures had been suspended, and at the Restoration the feeling was unanimous in favour of abolishing those intolerable feudal burthens which had so long survived their original *raison d'être*. By the 12 Car. II. *c.* 24, it was enacted that the Court of Wards and Liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeiture of marriages, by reason of any tenure of the king's majesty, or of any other, by knight service, and all other gifts, grants, or charges incident or arising therefrom, be totally taken away, from February 24, 1645 (the date of the intermission of the Court of Wards by the Long Parliament); and that all

(*a*) By a legal fiction, the first year of Charles II.'s reign was called the twelfth; king *de jure*, on the death of Charles I., January 30, 1648-1649; king *de facto*, at the Restoration, May 29, 1660. ["Not without reason did the galled and cheated, robbed and oppressed nation send forth an exultant shout of relief and joy, when in 1660 the policy of Monk made it possible to exchange this delightful era of 'civil and religious liberty' for the 'tyranny' of its old monarchy and its old institutions. No man ever came to the throne amid more heartfelt rejoicing than Charles II."—F. W. Bain, The English Monarchy, p. 156.—Ed.]

(*b*) Fox, Reign of James II., p. 22.

fines for alienation, tenures by homage, knight service, and escuage, and also aids for marrying the king's daughter, or knighting his son, and all tenures of the king *in capite*, be likewise taken away (*c*); and that all sorts of tenures, held of the king or others, be turned into *free and common socage*, save only tenures in frankalmoign, copyholds, and the honorary services of grand serjeanty. By the same statute the famous rights of purveyance and pre-emption were also finally abolished. The immediate and direct benefits conferred by this Act constituted a grateful boon to the landowners of the kingdom, and, so far as regards the abolition of purveyance, to the nation at large. Indirectly, too, the whole nation gained by the simplification of tenure, and more especially by the "important change in the spirit of our constitution," which Hallam has noted as a consequence of the curtailment, by this statute, of the prerogative of the crown, which, "by its practical exhibition in these two vexatious exercises of power, wardship and purveyance, kept up in the minds of the people a more distinct perception, as well as more awe, of the monarchy, than could be felt in later periods, when it has become, as it were, merged in the common course of law, and blended with the very complex mechanism of our institutions" (*d*). In consideration of the surrender of these feudal privileges by the crown, the parliament resolved to make up the royal revenue to the annual sum of £1,200,000. As the landed gentry were the great gainers by the surrender, they ought, in justice, to have been subjected to some compensatory tax: and a proposal was made that a permanent tax should be laid on lands held in chivalry, which, as distinguished from those held in socage, had been alone liable to the feudal burthens. But being powerful in parliament, the landowners succeeded, though only by the small majority of two, in substituting a hereditary excise on beer and some other

Hereditary excise granted in exchange.

(*c*) For the incidents of feudal tenure, see *supra*, pp. 55 *seq.* Hargrave (Co. Litt. by Hargrave, 108, n. 5) considers this mention of tenures *in capite* to have been a mistake by the framers of the Act. "It is, at all events, certain that the enactment was not intended to prohibit persons from holding immediately under the crown. Indeed, it is in this manner that land in fee is now most usually held."—Stephen, Comm. (5th ed.), i. 209, n. *g*.

(*d*) Hallam, Const. Hist., ii. 311.

liquors, thus transferring their own particular burthen to the community at large (*e*).

Act against tumultuous petitioning. 1661.

By the 13 Car. II. st. 1, c. 5, it was enacted that no petition to the king or either House of Parliament for alteration of matters established by law in church or state (unless the contents thereof had been previously approved, in the country by three justices of the peace or the grand jury of the county, and in London by the lord mayor, aldermen and common council), should be signed by more than twenty, or delivered by more than ten, persons, under penalty in either case of £100 fine and three months' imprisonment.

Right of the subject to petition the crown and parliament.

The right of petitioning the crown and parliament is one of the most valuable possessed by the subject, and seems to have been exercised from the earliest times. But for many centuries it was practically restricted to petitions for redress of private and local grievances, and the remedies prayed for were such as have since been provided by courts of equity and by private Acts of Parliament. The practice of petitioning on political subjects came into vogue during the period of the Great Rebellion, many petitions, signed by large bodies of people, being presented both to Charles I. and the Long Parliament; and it was probably the recollection of the intimidation exercised by numerous bodies of petitioners in the early days of the Long Parliament which prompted this restraining Act of Charles II. In December 1679, in consequence of the dissatisfaction of the nation at the repeated prorogations, great exertions were made to get up numerously signed petitions to the king for the assembling of parliament. A royal proclamation was thereupon issued, forbidding all persons to sign such petitions under pain of punishment. This, though it checked, did not entirely prevent, the presentation of these petitions. Counter-addresses were therefore sent up to the throne from grand juries, magistrates, and many corporations, expressing their *abhorrence* of the petitions for the assembling of parliament; whence the two principal parties in the country,

(*e*) The excise was not a newly invented tax, having been originally imposed by the Long Parliament in 1643.

subsequently distinguished as whigs and tories, obtained for the time the names of petitioners and abhorrers. By the Bill of Rights the right of the subject to petition the king was expressly sanctioned; but the House of Commons for a long time showed itself intolerant of a free expression of opinion, and extremely jealous of any semblance of interference with its functions. In 1701 the commons imprisoned five of the Kentish petitioners until the end of the session, for praying the House to attend to the voice of the people and turn its loyal addresses into bills of supply. Any petition expressing opinions of which the majority of the House did not approve was liable to summary rejection. In 1772, a most temperate petition, signed by about 250 of the clergy and by several members of the professions of law and physic, praying for relief from subscription to the Thirty-nine Articles, was rejected by a large majority of the commons. Seven years later, however, in 1779, a widely-organised attempt to procure parliamentary and economical reform gave rise to a general system of petitioning, in which the freeholders of Yorkshire led the way and were soon followed by many other important counties and by the principal cities. "This," observes Sir Erskine May, "may be regarded as the origin of the modern system of petitioning, by which public measures, and matters of general policy, have been pressed upon the attention of parliament. Corresponding committees being established in various parts of the country were associated for the purpose of effecting a common object by means of petitions, to be followed by concerted motions made in parliament. An organisation which has since been so often used with success was now first introduced into our political system" (*f*). The great movement for the abolition of the slave trade, which began with a petition from the quakers in 1782, affords the most remarkable example of direct influence of petitions upon the deliberations of parliament. But it was not until the latter part of the reign of George IV. that petitioning obtained the development which has since distinguished it in all the great political movements. Not only is the right to petition

(*f*) May, Const. Hist., ii. 63 *seq.*

now fully recognised, but "the act of petitioning is free to all, and parliament will receive any petition respectfully worded, and complying with the forms of the House, whilst the statute of 13 Car. II. has nearly become a dead letter, and under ordinary circumstances no one dreams of enforcing that Act (intended to prevent violent and tumultuous petitioning), or of inquiring, when a petition is presented, whether its conditions have been complied with" (*g*).

Appropriation of supplies.

In the session of 1665 the commons took advantage of the necessity under which the king lay, of asking for extraordinarily large grants for the prosecution of the Dutch war, to establish the important principle of appropriating the supplies to specific purposes. Sir George Downing, one of the tellers of the exchequer, introduced into the Subsidy bill granting the sum of £1,250,000 for the war with Holland (*h*), a proviso that all moneys raised by virtue of that Act should be solely applicable to the service of the war, and should not be issued out of the exchequer except by order or warrant mentioning that they were payable for such service. Despite the furious opposition of Clarendon, who stigmatised the proviso as derogatory to the honour of the crown, Charles himself insisted upon this restraint on the executive power, having been persuaded that the bankers would be more easily induced to advance the money, in anticipation of the revenue, upon this better security for speedy repayment. The principle of appropriating the supplies was by no means a novelty in the constitution, but it had only been put into practice occasionally and at long intervals (*i*). The complete authority exercised by the commons, during the late Civil War and the Commonwealth, over the whole receipts and expenditure of the national treasury, had accustomed the House to regulate the disbursement of the sums which they granted; the advantage to the nation from their control of its finances was self-evident; and from the date of the

(*g*) Broom, Const. Law, p. 511. It was, however, expressly decided by Lord Mansfield, on the trial of Lord George Gordon for his share in the "No Popery" riots of 1780, that the Act of Car. II. had not been repealed; and it was cited in 1848, when it was found necessary to prohibit the large body of Chartist petitioners from carrying out their declared intention of marching to the House to present their petition.

(*h*) 17 Car. II. c. 1.

(*i*) *Supra*, p. 254.

Appropriation Act of Charles II. it became "an undisputed principle, recognised by frequent and at length constant practice," that "supplies granted by parliament are only to be expended for particular objects specified by itself" (*k*). The principle of appropriation was not, however, carried into full effect till after the Revolution. But from the reign of William III. it has been the invariable usage to insert a clause in the annual Appropriation Act prohibiting under severe penalties, as well the lords of the treasury from issuing, as the officers of the exchequer from obeying, any warrant for the expenditure of money in the national exchequer upon any other service than that to which it has been specifically appropriated. The permanent establishment of the principle and practice of appropriation "has given the House of Commons," remarks Hallam, "so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence, nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for. . . . It is to this transference of the executive government (for the phrase is hardly too strong) from the crown to the two Houses of Parliament, and especially the commons, that we owe the proud attitude which England has maintained since the Revolution, so extraordinarily dissimilar in the eyes of Europe to her condition under the Stuarts. The supplies, meted out with niggardly caution by former parliaments to sovereigns whom they could not trust, have flowed with redundant profuseness when they could judge of their necessity and direct their application" (*l*).

Commission of public accounts.

In the session of 1666, the demand of large additional supplies for the Dutch war, coupled with the indifferent success which had attended the military operations, provoked suspicions of the dishonest appropriation of the money previously voted. The commons appointed a committee to inspect the accounts of the officers of the navy, ordnance, and stores, and subsequently sent up a bill

(*k*) Hallam, Const. Hist., ii. 355, 356.
(*l*) Const. Hist., iii. 116, 117.

appointing commissioners to inspect the public accounts, with full powers to inquire and report as to such persons as they should find to have broken their trust. While this measure was impending, the king prorogued parliament, but promised to issue a royal commission for the examination of the accounts. In the following session, 1667 (Lord Clarendon having fallen in the interval), the commons reintroduced their bill, which passed as "An Act for taking the accounts of the several sums therein mentioned" (*m*). Commissioners (who were to report from time to time to the king and both Houses of Parliament) were nominated in the Act and invested with most extensive powers, not only for auditing the public accounts, but for investigating frauds in the expenditure of money, and employment of stores. They were authorised to examine upon oath, to summon inquests, to commit to prison without bail all persons disobeying their orders, and to determine finally on the charge and discharge of all accounts; and upon a certificate of their judgment the barons of the exchequer were directed to issue process for recovering money to the king's use, as if there had been an immediate judgment of their own court (*n*). The passing of this statute marked a further step in that transfer of the control of the executive administration from the crown to the House of Commons, which, throughout the long existence of the "Pensionary" Parliament of Charles II., was quietly but steadily proceeding.

The National Debt.

The commencement of the National Debt (*nn*) dates from the reign of Charles II. During the Civil War large sums of money were deposited, for safe custody, with some of the most eminent London goldsmiths, who, after the Restoration, continued to act in their new capacity as bankers, and began to advance money to the national exchequer on the security of an assignment of some branch of the public revenue. Down to 1672 these loans were always punctually repaid; but in that year, at the outbreak of the Dutch war, Charles II. was persuaded by the cabal administration to issue a proclamation forbidding the pay-

(*m*) 19 Car. II. c. 9. (*n*) Hallam, Const. Hist., ii. 358, 359.

(*nn*) [This topic (to p. 595 *infra*) is transferred here from the footnote on p. 494 of the preceding edition.—Ed.]

ment of any money out of the exchequer due upon existing securities, but promising, instead, to add the interest then due to the capital and to allow 6 per cent. interest on this new stock. By this iniquitous proceeding, which caused several bankers to fail, and reduced many of their customers to the deepest distress, the king acquired the disposal of about £1,300,000. Interest was paid down to the year 1683, when even this was stopped: and nothing was done for the public creditor until 1699, when an Act was passed (which was not to take effect till December 25, 1705) charging the excise with payment, from the latter date, of 3 per cent. interest on the principal sum of £1,328,526, redeemable on payment of a moiety, but no compensation was made for the loss of twenty-two years' arrears of interest. Five years previously, in 1694, the sum of £1,200,000 at 8 per cent. interest had been borrowed by the government from a body of merchants, who, in return, received the privilege of incorporation, by royal charter, as "The Governor and Company of the Bank of England." The charter was originally granted for only eleven years certain, parliament reserving the right to redeem the debt at any time after 1705, upon giving a year's notice; and with the redemption of the debt the charter was to expire. But far from paying off old debts, new loans were from time to time raised by the government in a similar manner, and the bank charter has been prolonged by several renewals. At the end of William III.'s reign the National Debt amounted to over £16,000,000, under Queen Anne it reached the sum of £54,000,000. The Spanish War, which commenced in 1739, added £31,300,000; and in 1763, after the Seven Years' War, the debt amounted to £146,000,000. The American War of Independence increased the debt by £121,000,000; and £601,000,000 was added during the great French War, at the close of which it had reached the enormous total of £840,850,491, involving an annual expenditure for interest and management of £32,038,191.

Bank of England established, 1694.

Attempts to reduce the debt.

The apprehensions excited by the steady advance of the debt caused efforts to be made at an early period for its reduction. Sir Robert Walpole instituted a sinking fund, of which great hopes were entertained, and under the opera-

tion of which the capital amount had been reduced by about £7,000,000 prior to the outbreak of the Spanish War in 1739. Some further slight reductions were made during subsequent intervals of peace, and in 1786 Pitt established his famous permanent sinking fund of £1,000,000 a year, which was perseveringly maintained for many years, even when it was necessary to contract fresh loans for that purpose. Since 1829 the absurdity of paying off the debt by borrowing has been abandoned, and only surplus annual revenue has been applied in the reduction of the debt. By an Act passed in 1875, provision was made for its gradual reduction by means of a new permanent sinking fund, maintained by annual votes (*o*).

Collisions between lords and commons under Charles II.

A singular proof (*oo*) of the influence of the commons under Charles II. is furnished by the result of the famous controversy between the two Houses as to the original juris-

(*o*) [There are three heads to which the National Debt is now assigned; and the "sinking fund" has now become what is termed "terminable annuities."

The National Debt is classified as follows:—

i. *The Permanent Debt* or Funded: that is, the debt which the Government is not bound to redeem at any determinate time. ii. *Terminable Annuities*, by means of which, at the expiration of the annuity, the capitalised sum is cancelled, and a corresponding reduction made to the National Debt. iii. *Unfunded Debt*, consisting of loaned moneys repayable at certain dates, from three months to five years. The great financial change of Mr. (afterwards Lord) Goschen, reducing the interest on the first-named, or *funded* securities, to 2¾ per cent., now reduced to 2½ per cent., was an innovation of great magnitude, a break being made in the continuity of a form of property regarded by the English public as equivalent to landed estate. In 1899, immediately prior to the outbreak of the South African War, the gross total of the National Debt was £635,040,965—a *reduction* having been effected, since the accession of Queen Victoria, of £153,000,000. The operations in China and the South African War *added*, however, almost a like sum. The gross amount in 1909 stood at £754,121,309. In 1914 at the outbreak of the Great War, the sum was 708 millions; in 1916, owing to unparalleled war expenditure, it rose to 2,197 millions; in 1917 it increased to 3,900 millions (of which 964 millions represented advances to Allies and Dominions.). *Cf.* Earl Russell, Eng. Gov. and Const., 225; Hallam, Const. Hist., iii. 132, 212; Macaulay, Hist., i. 169; Maitland, Const. Hist., pp. 438-442; and the Statesman's Year Book for 1917; Encycl. Brit. (11th ed.), sub. "Banks and Banking." The Budget of 1909-10, introduced by Mr. Lloyd George, imposed heavy taxation, by which land was especially burdened. The result has been to depreciate the value of the Permanent or Funded Securities, known as *Consols* (consolidated), and it is not improbable that they will further decline in price, owing to a want of confidence on the part of the public in this class of investment.]

(*oo*) [This paragraph was a footnote in preceding edition, p. 489.—Ed.]

diction of the lords in the case of *Skinner* v. *The East India Company* [1668-9]. The lords having entertained a petition of Skinner against the Company, overruled the defendants' plea to the jurisdiction, and condemned them to pay the plaintiff £5,000, the Company presented a complaint to the House of Commons. The commons resolved "that the lords, in taking cognisance of an original complaint, and that relievable in the ordinary course of law, had acted illegally, and in a manner to deprive the subject of the benefit of the law." The lords, in return, voted, "That the House of Commons entertaining the scandalous petition of the East India Company against the Lords' House of Parliament, and their proceedings, examinations, and votes thereupon had and made, and a breach of the privileges of the House of Peers"; and that their own proceedings in *Skinner's case* had been "agreeable to the laws of the land, and well warranted by the law and custom of parliament, and justified by many parliamentary precedents ancient and modern." After two conferences between the Houses had failed to produce an amicable settlement of the dispute, the commons voted Skinner into custody for a breach of privilege, and resolved that whoever should be aiding in execution of the order of the lords against the East India Company should be deemed a betrayer of the liberties of the commons of England and an infringer of the privileges of the House. The lords, in return, committed to prison Sir Samuel Barnardiston, Chairman of the Company, and a member of the House of Commons, and imposed on him a fine of £500. By successive adjournments and prorogations the king managed to stop the course of the quarrel during fifteen months. But at the meeting of parliament in 1669, the commons renewed the dispute. Ultimately, the king recommended an erasure from the journals of all that had passed on the subject, and an entire cessation—an expedient which both Houses willingly embraced; and from this time the lords have tacitly abandoned all pretensions to an original jurisdiction in civil suits (*p*).

(*p*) ["After this time," says Pike, Const. Hist. House of Lords, p. 282, "the jurisdiction of this House as a court of first instance in civil causes, may be regarded as having been at an end." See also Holles, The Grand

The Houses also came into collision on account of what was deemed a breach of privilege in the citation of members of the commons to appear before the lords as respondents in chancery appeals. The most celebrated case is the appeal of Shirley against Sir John Fagg, in 1675, which gave rise to much intemperate behaviour on both sides, and induced the commons to vote that there lies no appeal to the judicature of the lords in parliament from courts of equity. The dispute was at length only put an end to by the long prorogation from November 1675 to February 1677. The particular appeal of Shirley was never revived; but the lords continued without objection to exercise their general jurisdiction over appeals from courts of equity. Further, the commons, in 1671, successfully resisted the right of the lords to amend money-bills (*q*).

Habeas Corpus Act, 1679.

Of all the statutes passed in the reign of Charles II., perhaps the most celebrated is the Habeas Corpus Act. But although this Act afforded to the subject a prompt and efficacious remedy in many cases of illegal imprisonment, it is a mistake to suppose that it introduced any new principle or conferred any new right.

Ancient remedies for illegal detention.

The right of personal liberty the most precious of all rights is as old as the constitution itself It rests upon the common law, which was merely defined and declared by Magna Carta and the stream of statutes which affirm that enactment. The subject was therefore always legally free from detention except upon a criminal charge or conviction, or for a civil debt. Besides the ancient writs *De odio et atiâ* and *De homine replegiando* (which were available only in particular cases) (*r*) any freeman imprisoned was entitled at common law to demand of the court of King's Bench a writ of habeas corpus, or *corpus cum causâ* as it was called, directed to the keeper of the prison, and commanding him to bring up the body of the prisoner, with the cause of the caption and detention, in order that the court might judge of its sufficiency, and

Question Concerning the Judicature of the House of Peers (1689): 8 Rep. Hist. MSS. Com., 165-168, cited by Pike, note to p. 281.—Ed.]

(*q*) *Supra*, p. 549, *n.* (*c*). Hallam, Const. Hist., iii. 30.

(*r*) *Supra*, pp. 108, 113, 114.

either remand the prisoner, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and *ex debito justitiæ*, and could not be denied. It possessed, however, various defects. (1) The gaoler was not bound to make an immediate return to the writ, but might wait for a second writ called an "*alias*," and a third, a "*pluries*"; and other expedients, such as shifting the prisoner about from prison to prison, were sometimes adopted in order to evade obedience. (2) It was doubtful whether the court of Common Pleas could issue this writ; and the Court of Exchequer seems never to have done so. It was also doubtful whether a single judge of the Court of King's Bench could issue it during the vacation.

Inadequacy of the ancient remedies.

These defects caused much delay in obtaining the writ; but a more serious matter was the attempt made by the crown to defeat the right altogether, by maintaining that the "special command of the king" was *per se* a sufficient cause to justify the commitment and detention of a subject. This vitally important point was, as we have seen, elaborately argued in court and in parliament in the great *Case of the Five Knights* (*Darnel's case*) in 1627 (*s*), and was intended to have been settled by the Petition of Right, which declared against it (*t*). The arbitrary arrest of Sir John Eliot, Selden, and other members, on the dissolution of parliament in 1629, and the attempt made to evade the words of the Petition of Right by setting forth in the warrant and in the return to the habeas corpus a colourable cause of commitment, "notable contempts of the king and government and stirring up sedition," led to the enactment of the remedial clauses concerning the writ of habeas corpus contained in the Act which abolished the Star Chamber (*u*).

Under Charles II. the arbitrary conduct of Lord Clarendon, in procuring political offenders to be illegally imprisoned in distant and unknown places, directed public attention to the necessity for a more speedy and effective process of enforcing the subject's right to personal liberty (*w*). In April 1668, a bill to prevent the refusal of the writ of habeas corpus was introduced in the House

Abortive attempts at a remedy.

(*s*) [3 St. Tr. 1; Broom, Const. Law, pp. 158-204.] (*t*) *Supra*, pp. 517, 520, 523. (*u*) 16 Car. I. c. 10. *Supra*, pp. 532, 558. (*w*) *Infra*, p. 634.

of Commons, but did not pass through committee. In March 1670, another bill to the same effect was sent up to the lords, but fell through. In the session of 1673-1674, the commons passed two bills—one to prevent imprisonment in gaols beyond the seas, the other to give a more expeditious use of the writ of habeas corpus in criminal matters. These appear to have failed in the Upper House, as similar bills were sent up to the lords in 1675, and with a like result. In 1676 the delay and difficulty in procuring a habeas corpus were forcibly exemplified in the case of Francis Jenkes, a citizen of London. He had delivered a speech at the Guildhall urging that a common council should speedily be held to petition the king, in the name of the City, to call a new parliament. For this he was summoned before the Privy Council and committed to prison. Various attempts were unsuccessfully made to obtain his enlargement. The Court of Quarter Sessions for Westminster refused to admit him to bail, on the plea that he had been committed by a superior court; or to try him, because he was not entered in the calendar of prisoners. The lord chancellor, on being applied to for a habeas corpus, refused to issue it during the vacation; and the chief justice of the King's Bench, to whom in the next place recourse was had, made so many difficulties that Jenkes lay in prison many weeks before he was eventually enlarged on bail.

The Act of 1679.

At length, in 1679, three years after the proceedings in *Jenkes' case*, the famous Habeas Corpus Act was passed. It is intituled "An Act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas," and it is restricted to the case of persons imprisoned (before sentence) for "criminal or supposed criminal matters." It enacts: (1) That on complaint and request in writing by or on behalf of any person committed and charged with any *crime* (unless committed for treason or felony plainly expressed in the warrant; or as accessory or on suspicion of being accessory before the fact to any petit treason or felony; or upon suspicion of such petit treason plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process) the

lord chancellor or any of the judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two whole terms after his imprisonment to apply to any court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges. And upon service thereof the officer in whose custody the prisoner is shall bring him before the said lord chancellor or other judge, with the return of such writ and the true cause of the commitment; and thereupon, within two days after the party shall be brought before them, the said lord chancellor or other judge shall discharge the prisoner, if bailable, upon giving security in any sum according to their discretion having regard to his quality and the nature of his offence, to appear and answer to the accusation in the proper course of judicature. (2) That such writs shall be endorsed as granted in pursuance of this Act, and signed by the person awarding the same. (3) That the writ shall be returned, and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days after service of the writ. (4) That officers and keepers neglecting or refusing to make due returns, or not delivering to the prisoner or his agent within six hours after demand a true copy of the warrant of commitment or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in sec. 8 of the Act), shall for the first offence forfeit £100, and for the second offence £200 to the party grieved, and be disabled to hold his office. (5) That no person once delivered by habeas corpus shall be recommitted for the same offence, on penalty to the party of £500. (6) That every person committed for treason or felony, shall, if he requires it, the first week of the next term, or the first day of the next session of over and terminer, be indicted in that term or session, or else admitted to bail, unless it appear, upon oath made, that the king's witnesses cannot be produced at that time; and if acquitted, or not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes

shall be open for the county in which he is detained, shall be removed from the common gaol by habeas corpus till after the assizes are ended, but shall be left to the justice of the judges of assize. (7) That any such prisoner may move for and obtain his habeas corpus as well out of the chancery or exchequer as out of the King's Bench or Common Pleas: and the lord chancellor, or judges denying the same, on view of the copy of the warrant, or oath that such copy is refused, shall forfeit severally to the party grieved the sum of £500. (8) That this writ of habeas corpus shall run into the counties palatine, the cinque ports, and other privileged places, and the islands of Jersey and Guernsey. (9) That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, Tangier (*x*), or any places beyond the seas within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than £500, to be recovered with treble costs: shall be disabled to bear any office of trust or profit: shall incur the penalties of praemunire: and shall be incapable of receiving the king's pardon for any of the said forfeitures, losses, or disabilities (*y*).

Its defects.

Such is the substance of this great and important statute. It was subject, however, to three defects. (1) It fixed no limit on the amount of bail which might be demanded. (2) It only applied to commitments on criminal or supposed criminal charges: all other cases of unjust imprisonment being left to the habeas corpus at common law as it subsisted before this enactment. (3) It did not guard against falsehood in the return.

Remedied later.

The first of these defects was remedied in 1689, by the Bill of Rights, which declared "that excessive bail ought not to be required." The other two (notwithstanding a serious attempt in 1757 to render the habeas corpus at

(*x*) The fortress of Tangier in Africa (together with the island of Bombay) was acquired by Charles II., in 1661, as a portion with his wife Katherine of Braganza. It was abandoned in 1684.

(*y*) 31 Car. II. c. 2; and see Stephen, Comm., iv. 25.

common law more efficient) subsisted down to the year 1816, when they were at length removed by "An Act for more effectually securing the liberty of the subject" (56 Geo. III. c. 100). By this Act, in addition to various minor but important improvements, the statutable remedy was extended to cases of imprisonment on non-criminal charges, and the judges were empowered to examine and determine the truth of the facts set forth in the return, and in all cases of doubt to bail the prisoner.

The legislation in regard to the writ of habeas corpus terminates with the Act 25 and 26 Vict. c. 20 (passed in consequence of the decision of the Court of Queen's Bench in *Anderson's case* (*z*), where the writ was issued into Upper Canada), which provides: That "no writ of habeas corpus shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the crown where her Majesty has a lawfully established court or courts of justice, having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion."

Acts against nonconformists.

In contrast with the beneficial legislation which we have been considering, is the series of odious acts against the nonconformists passed by the "Cavalier" or "Pensionary" Parliament of Charles II. This parliament—"the Long Parliament of the Restoration," which lasted from May 8, 1661, to January 24, 1679—was, during the first few years of its existence, "more zealous for royalty than the king, more zealous for episcopacy than the bishops" (*a*). As the terror from the late Civil War abated it gradually threw off its exuberant loyalty, and though its leaders were corrupt, they were too much alive to their own interests ever to sacrifice any parliamentary power. But the devoted attachment to the established church and the hatred of sectaries, which distinguished its earlier sessions, continued unabated to the last.

Corporation Act, 1661.

By the "Act for the well-governing and regulating of Corporations" (13 Car. II. st. 2, c. 1) a religious test was

(*z*) [1861] 30 Law Journ. Rep. Q.B. 129.
(*a*) Macaulay, Hist., i. 176.

combined with a political test. All corporate magistrates and office-bearers were obliged to take "the Sacrament of the Lord's Supper, according to the rites of the Church of England," to renounce the Solemn League and Covenant, and to swear that they believed it unlawful, on any pretence whatever, to take arms against the king, and that they abhorred the "traitorous position" of bearing arms by his authority against his person or his officers. "These provisions," remarks Hallam, "struck at the heart of the presbyterian party, whose strength lay in the little oligarchies of corporate towns, which directly or indirectly returned to parliament a very large proportion of its members" (*b*). But they equally affected all other nonconformists, and established an inequality of civil rights between churchmen and dissenters which continued down to our own day. The political test contained in the corporation oath of *non-resistance*, having been practically renounced at the Revolution, was abolished in 1718, shortly after the accession of the House of Hanover, by the "Act for quieting and establishing corporations" (5 Geo. I. c. 6, s. 2). The religious test was not repealed till the reign of George IV. (*c*).

Test Act, 1673.

The famous Test Act (25 Car. II. c. 2) was passed in 1673, "for preventing dangers which may happen from popish recusants." It was provoked by the "Declaration of Indulgence," recently issued by the king, dispensing with the laws against nonconformity. This declaration, though apparently a concession to the protestant dissenters, was really intended as a step towards the re-establishment of the Roman catholic religion, in which the Duke of York was an avowed, Charles an unavowed believer. By the secret Treaty of Dover, in 1670, the king, his brother, and Louis XIV. of France, had entered into a royal conspiracy against the national church and civil liabilities of England. The precise terms of this treaty were not then indeed authentically known, "but there can be no doubt," says Hallam, "that those who from this time displayed an insuperable jealousy of one brother, and a determined

(*b*) Hallam, Const. Hist., ii. 328.
(*c*) 9 Geo. IV., c. 17 (1828).

enmity to the other, had proofs enough for moral conviction of their deep conspiracy with France against religion and liberty. This suspicion is implied in all the conduct of that parliamentary opposition, and is the apology of much that seems violence and faction, especially in the business of the popish plot and the bill of exclusion." The secret treaty of Dover "may be reckoned the first act of a drama which ended in the Revolution" (*d*). The king's Declaration of Indulgence united in opposition to it not only the zealous churchmen, who were disgusted at the favour shown to both papists and dissenters, but also the dissenters themselves, whose hatred of popery outweighed their gratification at their own toleration, as well as all others of liberty and law, who could not but regard the king's pretensions, in explicit terms, to suspend a body of statutes, and his command to magistrates not to put them in execution, as an assertion of despotic power illegal in itself, and capable of most dangerous extension. The House of Commons voted "that penal statutes in matters ecclesiastical cannot be suspended but by Act of Parliament," and addressed the king to recall his declaration. In his answer the king lamented that the commons should question his ecclesiastical power, which had never, he said, been done before. To which they replied that they "humbly considered that his Majesty had been very much misinformed; since no such power was ever claimed or exercised by any of his predecessors: and, if it should be admitted, might tend to the interruption of the free course of the laws, and altering of the legislative power, which had always been acknowledged to reside in the king and the two Houses of Parliament" (*e*). At length the king was obliged to give way, and cancelled the declaration. But the commons, not satisfied with this concession, extorted his assent to the Test Act, as a measure of security against popish councillors and officials. The Act, however, was so framed as to affect with equal disqualification nearly all classes of protestant dissenters. It provided that all persons holding any office or place of trust, civil or military,

(*d*) Hallam, Const. Hist., ii. 384.
(*e*) Cobbett's Parl. Hist., iv. 551.

or admitted of the king's or the Duke of York's household, should publicly receive the Sacrament according to the rites of the Church of England, and also take the oath of supremacy, and subscribe a declaration against transubstantiation. The immediate effect of the Act was to compel Lord Clifford to resign his office of treasurer, and the Duke of York to quit the post of lord high admiral.

Bill for relief of dissenters

In return for the support given by the dissenters to the Test Act, a Bill was passed, after some debate, by the House of Commons, giving a considerable amount of relief to protestant sectaries; but it was delayed in the Lords' House, who introduced several amendments, and a sudden prorogation caused it to be dropped.

Parliamentary Test Act, 1678.

Five years later, in 1678, a parliamentary test was imposed which, for the first time, excluded Roman catholic peers from parliament. This was mainly due to the alarm excited in the nation by the discovery of the supposed popish plot (*f*). By the "Act for the more effectual preserving the king's person and government, by disabling papists from sitting in either House of Parliament" (30 Car. II. st. 2, c. 1), it was provided that no peer, or member of the House of Commons, should sit or vote without taking the oaths of allegiance and supremacy, and a declaration repudiating the doctrine of transubstantiation, the adoration of the Virgin, and the sacrifice of the mass. Peers and members offending were to be deemed and judged popish recusant convict, and forfeit £500, besides suffering numerous disabilities. While the bill was in the Lords' House, the Duke of York moved that an exception might be admitted in his favour, and this was agreed to, but only by a majority of two (*g*).

(*f*) "It is to be remembered that there was really and truly a popish plot in being, though not that which Titus Oates and his associates pretended to reveal—not merely in the sense of Hume, who, arguing from the general spirit of proselytism in that religion, says there is a perpetual conspiracy against all governments, protestant, mahometan, and pagan, but one alert, enterprising, effective, in direct operation against the established protestant religion in England."—Hallam, Const. Hist., ii. 420.

(*g*) From the time of Elizabeth the oath of supremacy had been exacted from members of the House of Commons, but not from the lords (*supra*, pp. 430-1). Roman catholic lords were now for the first time excluded from their seats; and until the reign of George IV. (10 Geo. IV. c. 7) both Houses were effectually closed to the members of that religion.

In the declaration issued by Charles II. from Breda (April 14, 1660), he had embodied the Cromwellian principle, that no man should be called in question for differences of religious opinion not disturbing the peace of the kingdom. But the great majority of the English people were not yet prepared to concede toleration; and by the Act of Uniformity all dissenters from the established church, protestant and Roman catholic alike, were subjected to the bonds of a rigid conformity. The provisions of this celebrated statute (13 & 14 Car. II. c. 4) may be divided into two classes: (1) Clauses which continue in force at the present day, viz., those which legalise the Book of Common Prayer as then recently revised in convocation, with a direction for its use in every parish church and other places of public worship; and which require episcopal ordination of all persons holding ecclesiastical preferment, together with a declaration from all such persons of unfeigned assent and consent to the contents of the Book of Common Prayer. (2) Certain persecuting clauses directed against dissenters, which have since been repealed. By the 34th section, the Uniformity Act of the 1st Eliz. c. 2 (1558-1559) was re-enacted; and as this incorporates by reference penal clauses in the earlier Uniformity Act of 5 & 6 Edw. VI. c. 1 (1551-1552), which again incorporates similar clauses in the Uniformity Act, 2 & 3 Edw. VI. c. 1 (1548), the statute of Charles II. revived and confirmed, (a) the offences of "declaring or speaking anything in the derogation, depraving or despising of the Book of Common Prayer, or of anything therein contained, or any part thereof," and of "willingly and wittingly hearing or being present at any other manner or form of Common Prayer than is mentioned and set forth in the Book of Common Prayer" (the punishment in each case being, for the third offence, imprisonment for life); and also (b) the compulsory attendance at parish churches. These provisions were not repealed till the reign of Queen Victoria (*h*).

Act of Uniformity, 1662.

The 14th sec. of the Act of Charles II. declared "that no person should presume to administer the holy sacrament

(*h*) 7 & 8 Vict. c. 192; 9 & 10 Vict. c. 59.

of the Lord's Supper," until he should be ordained priest by episcopal ordination, under the penalty of £100 for such offence. This penalty was repealed in 1688 by the Toleration Act of William and Mary (*i*).

By the 9th sec. not only all persons in holy orders, but all schoolmasters and persons instructing youth were required to subscribe a declaration of non-resistance, and that they would conform to the liturgy of the Church of England as by law established. Schoolmasters and private tutors were also subjected to the penalty of three months' imprisonment if they should presume to exercise their calling without previous licence from the bishop of the diocese. That part of the declaration which related to non-resistance was abolished at the Revolution by statute 1 William & Mary, c. 8; but the licence of private tutors, though in later times practically obsolete, was not repealed till 1846 by the 9 & 10 Vict. c. 59 (*k*).

The immediate result of the new Act of Uniformity was to eject from the established church about 2,000 ministers (for the most part non-episcopally ordained), who further recruited the ranks of protestant nonconformists. But these were not allowed to worship among themselves in peace. By the monstrous Conventicle Act (16 Car. II. c. 4) every person above sixteen years of age present at a conventicle (defined as "any meeting for religious worship at which five persons were present besides the household") was subjected to the penalty of three months' imprisonment for the first offence, of six for the second, and for the third to seven years' transportation. A single justice of the peace was empowered to convict for the first and second offences (a provision which, Burnet tells us, "was thought a great breach on the security of the English constitution") but transportation for the third offence could only be awarded on conviction by a jury. Return before the expiration of the term of banishment, or escape after conviction, was made felony punishable with death (*l*).

Conventicle Act, 1664.

(*i*) 1 Will. & Mary, st. 1, c. 18.

(*k*) On the Uniformity, Test, and Corporation Acts, see A. Amos, English Constitution in the reign of Charles II., pp. 87, 135.

(*l*) The Conventicle Act was limited in duration to three years, and expired in 1667. In 1670 it was renewed, with some mitigation of penalties, but

Five-Mile Act, 1665.

This enactment was followed in the next session by "An Act for restraining nonconformists from inhabiting in corporations" (17 Car. II. c. 2). By this "Five-Mile Act," as it is usually termed, (1) a new test oath of non-resistance was imposed upon the clergy; (2) every nonconformist minister was prohibited, under the penalty of £40 for each offence, from coming within five miles of any corporate town; or of any parish, town, or place wherein he had been parson, vicar, curate, stipendiary, or lecturer, or had taken upon him to preach in unlawful assembly or conventicle; and (3) all nonconformists, whether lay or clerical, were restrained from teaching in any public or private school under the penalty of £40 fine and six months' imprisonment.

Persecution of nonconformists.

The provisions of these merciless statutes were not allowed to remain a dead letter. The religious persecution was far more severe than it had ever been at any period of the Commonwealth, and more widely extended than under Charles I. (*m*). No less than 8,000 protestants are said to have been imprisoned during this reign, in addition to a large number of Roman catholics. Of 1,500 quakers who were confined, 350 died in prison (*n*).

Attempts at reconciliation.

In 1661 at the Savoy Conference, in 1669 under the Cabal Ministry, and again in 1674, through the exertions of Tillotson and Stillingfleet, attempts were indeed made to bring about a reconciliation between the church and the protestant nonconformists; but the real difficulty of effecting a compromise and the unyielding temper of both parties, caused every effort at comprehension to fail.

Origin of the whig and tory parties.

It was in the year 1679, during the intense public agitation caused by the introduction of a bill to exclude the Duke of York from the throne, on the ground of his professed romanism, that the now familiar names of whig

with an extraordinary proviso, which reversed the established legal principle of construing penal Acts: "That all clauses in the Act shall be construed most largely and beneficially for suppressing conventicles, and for the justification and encouragement of all persons to be employed in the execution thereof."—22 Car. II. c. 1.

(*m*) Hallam, Const. Hist., ii. 351.

(*n*) Neal, Hist. of the Puritans, v. 17; Delaune, Plea for Nonconformists; Short's Hist. 559.

and tory were first applied to the two great political parties in the state. The king, having dissolved parliament on May 27, in order to quash the exclusion project, numerous petitions were sent up from all parts of the country praying for the speedy meeting of a new parliament. These were met by others from the adherents of the court party, expressing abhorrence at the attempt to coerce the king to summon parliament, as an encroachment on the royal prerogative. The rival parties were termed in consequence "petitioners" and "abhorrers," names which were soon afterwards changed for "whig" and "tory" (*o*).

But although the whigs and tories were first so designated at the time of the Exclusion bill, the germs of the two parties may be discerned in the opposition of the puritan members of the Lower House to the upholders of the royal prerogative under Elizabeth, and their corporate existence may be carried back at least to the schism in the constitutional party in the commons, which manifested itself during the debates on the Grand Remonstrance in 1641 (*p*).

Difference between the two parties.

Both whigs and tories, it is to be observed, agreed in maintaining the system of government by king, lords, and commons, and all the ancient and fundamental institutions of the English constitution. But there was, nevertheless, a wide and irreconcilable difference of opinion between them. The tories looked towards the crown, and thought that the public good was best subserved by the exaltation

(*o*) *Supra*, p. 590. "It is a curious circumstance," observes Lord Macaulay, Hist., i. 258, "that one of these nicknames was of Scotch, and the other of Irish, origin. Both in Scotland and in Ireland misgovernment had called into existence bands of desperate men whose ferocity was heightened by religious enthusiasm. In Scotland, some of the persecuted Covenanters, driven mad by oppression, had lately murdered the primate, had taken arms against the government, had obtained some advantages against the king's forces, and had not been put down till Monmouth, at the head of some troops from England, had routed them at Bothwell Bridge. These zealots were most numerous among the rustics of the western lowlands, who were vulgarly called Whigs. Thus the appellation of Whig was fastened on the Presbyterian zealots of Scotland, and was transferred to those English politicians who showed a disposition to oppose the Court, and to treat Protestant Nonconformists with indulgence. The bogs of Ireland, at the same time, afforded a refuge to Popish outlaws, much resembling those who were afterwards known as Whiteboys. These men were then called Tories. The name of Tory was therefore given to Englishmen who refused to concur in excluding a Roman Catholic prince from the throne."

(*p*) *Supra*, pp. 565 *seq.*

of the royal prerogative; the whigs looked towards the people, whose welfare they regarded as the end and object of all governments. "They differed," says Hallam, "mainly in this: that to a tory the constitution, inasmuch as it was the constitution, was an ultimate point, beyond which he never looked, and from which he thought it altogether impossible to swerve; whereas a whig deemed all forms of government subordinate to the public good, and therefore liable to change when they should cease to promote that object. Within those bounds which he, as well as his antagonist, meant not to transgress, and rejecting all unnecessary innovation, the whig had a natural tendency to political improvement, the tory an aversion to it. The one loved to descant on liberty and the rights of mankind, the other on the mischiefs of sedition and the rights of kings. Though both, as I have said, admitted a common principle, the maintenance of the constitution, yet this made the privileges of the subject, that the crown's prerogative, its peculiar care. Hence it seemed likely that, through passion and circumstance, the tory might aid in establishing despotism, or the whig in subverting monarchy. The former was generally hostile to the liberty of the press, and to freedom of inquiry, especially in religion; the latter their friend. The principle of the one, in short, was amelioration, of the other, conservation" (*q*).

Failure of the Exclusion bill and prostration of the whigs.

The failure of the Exclusion bill and the excesses of the Opposition were followed by a violent reaction in public opinion, which laid the whig party prostrate, and enabled Charles II. to enjoy, during the last years of his reign, that despotic power for which he had long been languidly scheming.

Despotic power of Charles II. during the last years of his reign.

"It is difficult to say," Lord Russell has remarked, "for what reason Charles, a witty and heartless man of pleasure, embarked in the vast undertaking of making himself absolute. Perhaps his easy temper made him yield to the suggestions of his brother; perhaps he merely consented to the advice of his courtiers. The ready way of accomplishing this design, once adopted, was, as he conceived, to obtain money and troops from France. And as his father's throne had been overturned by religious

(*q*) Hallam, Const. Hist., iii. 198.

fanaticism, he proposed to lay the foundation of his own upon a religion of blind obedience. The scheme not running on smoothly, however, he gave it up, partly from laziness and partly from prudence, contenting himself with charitable donations from France from time to time. The virulent opposition of Shaftesbury, and the attempt to exclude his brother from the throne, again roused him to exertion; and the discovery of the Rye House plot afforded him a tolerable pretext for ridding himself of all his considerable enemies. Thus, without activity or anxiety, by merely taking advantage of events as they arose, he procured for himself an authority which those of his family who made kingcraft their occupation never possessed. He subdued the liberties of England, because it gave him less trouble than to maintain them. But still, though unsuccessful, the men who could propose and carry through the House of Commons a bill for the exclusion of the next heir to the throne evinced a spirit of honesty and freedom which no hazard could quell. The Bill of Exclusion was the legal warning of the Revolution" (*r*).

JAMES II. 1685-1688.

James II. ascended the throne in 1685, with a fixed design to make himself an absolute monarch, and to subvert the established church.

His despotic designs.

In many respects circumstances appeared peculiarly favourable to his despotic aims. The popular party were for the time completely crushed. The determination of Charles II.'s last parliament, in 1681, to accept of nothing but the Exclusion bill, had been punished by a sudden dissolution, after a session of only one week; and in violation of the plain letter of the law, which required that no longer interval than three years should elapse between the dissolution of one parliament and the assembling of another, no writs had since been issued for an election. The high church and tory party were loud in their advocacy of hereditary despotism as a divinely-ordained institution, and the University of Oxford had but recently (July, 1683) published a decree asserting the necessity of passive obedience, and condemning the works of Milton, Buchanan, and

(*r*) Earl Russell, Eng. Gov. and Const., p. 83

others, containing contrary propositions, to be publicly burnt. If it should be found necessary or expedient to summon a parliament, steps had been taken to render that assembly as subservient to the crown as its predecessors had been under Henry VIII. In 1683 an information *quo warranto* had been filed in the King's Bench against the Corporation of London, which, on the ground of some alleged irregularities, was adjudged to have forfeited its charters. The Corporation was then remodelled in such a manner as to render it a mere tool of the court. The same policy was pursued during the next five years against several other obnoxious corporations; many others were intimidated into making quasi-voluntary surrenders, receiving in return new charters, framed on a far more oligarchical model, and reserving to the king the right of appointing the first members (*s*); and the general result was to confine the power of returning a large proportion of the members of the House of Commons to nominees of the crown. In addition, Louis XIV. of France was ready and anxious to aid the designs of his brother monarch with money and men.

The customs illegally levied.

James began his reign by an illegal proclamation ordering the continued payment of the customs duties, which had been granted only for the late king's life. With much misgiving, the king yielded to the advice of his ministers and summoned a parliament. "Those who look," says Hallam, "at the debates and votes of this assembly, their large grant of a permanent revenue to the annual amount of two millions, rendering a frugal prince, in time of peace, entirely out of all dependence on his people; their timid departure from a resolution taken to address the king, on the only matter for which they were really solicitous, the enforcement of the penal laws on a suggestion of his displeasure; their bill entitled, for the preservation of his majesty's person, full of dangerous innovations in the law of treason, especially one most unconstitutional clause, that any one moving in either House of Parliament to change the descent of the Crown should incur the penalties of that

A servile parliament.

(*s*) Judge Jeffreys, on the northern circuit, in 1684, is said to have "made all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns."—North's Examen, 626, cited in Hallam, Const. Hist., ii. 451.

offence; their supply of £700,000, after the suppression of Monmouth's rebellion, for the support of a standing army; will be inclined to believe that, had James been as zealous for the Church of England as his father, he would have succeeded in establishing a power so nearly despotic that neither the privileges of parliament, nor much less those of private men would have stood in his way. . . . Nothing less than a motive more universally operating than the interests of civil freedom would have stayed the compliant spirit of this unworthy Parliament, or rallied, for a time at least, the supporters of indefinite prerogative under a banner they abhorred" (*t*). This motive was supplied by the king himself, in the alarm for the reformed church inspired by his manifest determination gradually to fill all places of trust, civil and military, with professors of the Roman catholic religion.

The opposition shown by the parliament to the king's avowed intention of keeping Romish officers in his service, contrary to the provisions of the Test Act, was punished by a hasty prorogation: and although parliament was continued in existence by further prorogations for about eighteen months before being dissolved, it was never again assembled during James's reign.

Increase of the standing army.

Taking advantage of Monmouth's late insurrection, the king increased the number of regular troops in England from 6,000 to about 30,000 (*u*): and as these were largely officered by Roman catholics, he trusted that he had rendered himself independent of all forcible opposition. Throwing off all disguise, he soon made it apparent that, with a bench of judges to pronounce his commands, and an army to enforce them, constitutional limitations would no longer be suffered to stand in the way of his despotic designs (*w*).

The dispensing power.

His first step was to procure a judicial decision in favour of his assumed prerogative of dispensing with the observance of the laws (*x*). Having carefully eliminated from the bench such of the judges as would not promise to decide

(*t*) Hallam, Const. Hist., iii. 50-52.
(*u*) [On the standing army, see *infra*, pp. 643 *seq.*]
(*w*) Hallam, Const. Hist., iii. p. 59.
(*x*) On the dispensing and suspending powers, see *supra*, pp. 293 *seq.*

according to his wishes (*y*), and having appointed others in their stead, a collusive action was brought against Sir Edward Hales, a recent convert to romanism, for the penalty of £500 incurred by accepting a military command without taking the oath and making the subscription required by the Test Act. The defendant having pleaded, in answer to the Act, a dispensation from the crown, eleven out of the twelve judges decided in favour of the prerogative, grounding their decision upon slavish maxims of absolute power which were capable of extension far beyond the immediate case (*z*).

The dispensing power, which the courts of law had thus solemnly recognised, was now vigorously and systematically exercised. Four Roman catholic peers, Powis, Belasyse, Arundell, and Jermyn of Dover, with Father Petre, a jesuit, were sworn of the Privy Council. Several clergymen who had seceded to romanism were authorised to hold benefices without complying with the requirements of the Act of Uniformity: the vice-chancellor of the University of Cambridge was deprived of his office for declining to confer, at the king's request, an academical degree upon Alban Francis, a Benedictine monk: and the fellows of Magdalen College, Oxford, were expelled for refusing to elect as their president a Roman catholic nominee of the crown. These last two acts of tyranny were accomplished under the summary and arbitrary jurisdiction of a new "Court of Commissioners for Ecclesiastical Causes," which the king had recently established in direct defiance of the Act of the Long Parliament (16 Car. I. c. 11) abolishing the High Commission Court, and of the more recent statute,

New High Commission Court.

(*y*) "I am determined," said the king to Chief Justice Jones, of the Common Pleas, "to have twelve judges who will be all of my mind as to this matter." "Your Majesty," answered the Chief Justice, "may find twelve judges of your mind, but hardly twelve lawyers." He was then plainly told that he must either give up his opinion or his place. "For my place," he answered, "I care but little. I am old and worn out in the service of the crown: but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give." He was dismissed, together with Montague, Chief Baron of the Exchequer, and two puisne judges, Neville and Charlton.—Macaulay, Hist., ii. 81.

(*z*) *Godden* v. *Hales* (1686), 2 Showers, Rep. 475; 11 State Trials, 1165; [see also *Thomas* v. *Sorrell* (1674), Vaughan, 330]; *cf.* Hallam, Const. Hist., iii. 61; and E. W. Ridges, Const. Law of England, p. 163.

13 Car. II. c. 12, which, while reinstating the clergy in the ecclesiastical power, had expressly forbidden the creation by commission of any similar court.

The whole government of the church (zz) was entrusted to seven commissioners (three clerics and four laymen), of whom the chancellor Jeffreys was the chief. "The words in which the jurisdiction of these officers was described were loose, and might be stretched to almost any extent. All colleges and grammar schools, even those which had been founded by the liberality of private benefactors, were placed under the authority of the new board. All who depended for bread on situations in the church or in academical institutions, from the primate down to the youngest curate, from the vice-chancellors of Oxford and Cambridge down to the humblest pedagogue who taught Corderius, were subject to this despotic tribunal. If any one of those many thousands was suspected of doing or saying anything distasteful to the government, the commissioners might cite him before them. In their mode of dealing with him they were fettered by no rule. They were themselves at once prosecutors and judges. The accused party was to be furnished with no copy of the charge. He was to be examined and cross-examined. If his answers did not give satisfaction, he was liable to be suspended from his office, to be ejected from it, to be pronounced incapable of holding any preferment in future. If he were contumacious, he might be excommunicated, or, in other words, be deprived of all civil rights and imprisoned for life. He might also, at the discretion of the court, be loaded with all the costs of the proceeding by which he had been reduced to beggary. No appeal was given. The commissioners were directed to execute their office notwithstanding any law which might be, or might seem to be, inconsistent with these regulations. Lastly, lest any person should doubt that it was intended to revive that terrible court from which the Long Parliament had freed the nation, the new visitors were directed to use a seal bearing exactly the same device and the same superscription with the seal of the old High Commission" (a).

(zz) [This paragraph was a footnote in the preceding edition.]

(a) Macaulay, Hist., ii. 92.

Declaration for Liberty of Conscience.

In April, 1687, James published his famous Declaration for Liberty of Conscience, declaring it to be his "royal will and pleasure that from henceforth the execution of all and all manner of penal laws, in matters ecclesiastical, for not coming to church, or not receiving the sacrament, or for any other non-conformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws, and every of them, is hereby suspended."

The king's manifest object in issuing this Declaration was to obtain the support of the protestant nonconformists in his attempt to achieve despotic power; for the Roman catholics had practically enjoyed religious toleration and freedom from civil disabilities from the date of James's accession to the throne. The nonconformists, however, for the most part, mistrusted the insidious advances of the king, and, against their own immediate interests, joined the church in resisting a measure which they well knew had for its ultimate object the restoration of romanism. It is to be observed that the Declaration went much farther than the prerogative recognised in *Hales's case* of dispensing with prohibitory statutes in the case of particular individuals, sweeping away, as it did in effect, a whole series of laws made for the security of the established church. It amounted, in the words of Mr. Justice Powell, "to an abrogation and utter repeal of all the laws; for I can see no difference, nor know any, in law, between the king's power to dispense with laws ecclesiastical and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament. All the legislature will be in the king, [which is a thing worth considering]" (*b*).

Second Declaration of Indulgence.

After a year's interval, during which the king had made rapid and open advances towards the establishment of romanism, the Declaration of Indulgence was published a second time, followed by an order in council directing it to be read in all churches, and for that purpose to be sent and distributed throughout their several dioceses by the bishops.

(*b*) Judgment of Mr. Justice Powell in the *Seven Bishops' Case* (1688), 12 State Trials, 183.

A humble petition of the primate and six other prelates (*c*) against this order, presented to the king in his own closet, was pronounced a seditious libel; and the Seven Bishops were sent to the Tower, and soon afterwards brought to trial before the court of King's Bench. Amidst the enthusiastic rejoicings of the whole nation, the jury returned a verdict of acquittal (June 30, 1688). "The prosecution of the bishops," remarks Macaulay, "is an event which stands by itself in our history. It was the first and last occasion on which two feelings of tremendous potency—two feelings which have generally been opposed to each other, and either of which, when strongly excited, has sufficed to convulse the state—were united in perfect harmony. Those feelings were, love of the church and love of freedom. During many generations every violent outbreak of high church feeling, with one exception, has been unfavourable to civil liberty; every violent outbreak of zeal for liberty, with one exception, has been unfavourable to the authority and influence of the prelacy and the priesthood. In 1688 the cause of the hierarchy was for a moment that of the popular party. More than nine thousand clergymen, with the primate and his most respectable suffragans at their head, offered themselves to endure bonds and the spoiling of their goods for the great fundamental principle of our free constitution. The effect was a coalition which included the most zealous cavaliers, the most zealous republicans, and all the intermediate sections of the community. The spirit which had supported Hampden in the preceding generation, the spirit which, in the succeeding generation, supported Sacheverell (*d*), combined to support the archbishop, who was Hampden and Sacheverell in one. . . . The names of whig and tory were for a moment forgotten. The old exclusionist took the old abhorrer by the hand. Episcopalians, presbyterians, independents, baptists, forgot their long feud, and remembered only their common protestantism and their common danger" (*e*).

The Seven Bishops.

(*c*) Their names were Sancroft, Archbishop of Canterbury; Lloyd, Bishop of St. Asaph; Ken, of Bath and Wells; Trelawny, of Bristol; Lake, of Chichester; Turner, of Ely; and White, of Peterborough.

(*d*) *Infra*, p. 641.

(*e*) Macaulay, Hist., ii. 391-393.

Invitation to the Prince of Orange.

On the day on which the verdict of "not guilty" was returned in the case of the Seven Bishops, the celebrated invitation, signed by the Earls of Danby, Devonshire, and Shrewsbury, Lord Lumley, Compton, Bishop of London, Admiral Edward Russell, and Henry Sydney, was despatched to William, Prince of Orange, and Stadtholder of the United Provinces. James now endeavoured to retrace his steps, but it was too late to regain the confidence of his people. Louis XIV. bestirred himself to assist his royal brother. He gave notice to the States-General that he was strictly bound in friendship and alliance with his Britannic Majesty, and that any attack on England would be considered as a declaration of war against France. But James, who appeared bent on his own ruin, formally disowned the existence of any such alliance between France and England; and Louis, in disgust, withdrew his troops from the Netherlands and poured them into Germany, thus removing from before William one of his greatest obstacles.

Landing of the Prince of Orange.

On November 5, 1688, William landed at Torbay, in Devonshire. It is unnecessary to enter at length into the details of a Revolution which the eloquent pages of Macaulay have rendered so generally familiar.

Flight of James.

William is requested to assume the provisional government.

After the second flight of James (December 23), an assembly composed of the lords spiritual and temporal then in London (about seventy in number) and of all persons who had been members of the House of Commons in the reign of Charles II., together with the lord mayor, aldermen, and fifty of the common council of London, requested the Prince of Orange to assume the provisional government of the country, and to summon all the constituent bodies of the kingdom to send up representatives to Westminster, to a Convention Parliament for the settlement of the affairs of the nation.

The Convention Parliament.

Parties in the nation.

The Convention Parliament met on January 22, 1688-1689. The nation was at this time divided into six parties, of which two—the blind enthusiasts for James II. who wished to recall him without stipulations, and the ultra-republicans, who wished to set up a Commonwealth—were too small and insignificant to exercise any appreciable influence. The bulk of the nation and of the Convention was divided among the remaining four parties, three being

tories of varying shades, and the fourth and largest the whig party. Of the tories (1) Sherlock's party, which was especially strong among the clergy, wished that a negotiation should be opened with James for his restoration on such conditions as might fully secure the civil and ecclesiastical constitution of the realm. (2) Sancroft's party maintained that the king's stupidity, perverseness, and superstition entitled the nation to treat him as though he were insane: they wished, therefore, to hand over the administration of the kingdom to a regent named by the estates of the realm, while continuing the title of James as nominal king. (3) Danby's party held that the king, by his flight, had abdicated his power and dignity; but that, as the throne of England could not be vacant for one moment, the crown had legally devolved on the next heir, who was the Princess of Orange. For as to James's infant son, his birth, they said, had been attended by such suspicious circumstances that it was impossible to admit his claim without inquiry (*f*); and as those who called themselves his parents had removed him to France, together with all those French and Italian women of the bedchamber who, if there had been foul play, must have been privy to it, inquiry had been rendered impossible. It only remained, then, to proclaim the Princess of Orange, who was actually Queen-Regent. (4) The whigs maintained that James, having by the gross abuse of his power, broken the mutual contract between king and people—expressed on one side by the coronation oath and on the other by the oath of allegiance—had forfeited the crown; that the throne was therefore vacant: and that it was the right of the nation to elect a new king, and to impose upon him such conditions as might ensure the country against misgovernment.

In the Upper House the tories, who for the most part favoured the scheme of a regency, were in a majority; in the commons the whigs greatly predominated.

Resolutions of the commons.

On January 28, the commons passed their celebrated resolutions: (1) "That King James having endeavoured to subvert the constitution of the kingdom by breaking the original contract between king and people, and having,

(*f*) The legitimacy of James II.'s son is now fully admitted by historians, but it was fiercely disputed at the time.

by the advice of jesuits and other wicked persons, violated the fundamental laws, and withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant." (2) "That it hath been found by experience inconsistent with the safety and welfare of this protestant kingdom to be governed by a popish prince."

To the second resolution, though obviously irreconcilable with the doctrine of indefeasible hereditary right, the lords at once gave their unanimous assent; but the first, which was debated clause by clause, encountered much opposition in the Upper House. The first division took place on the question whether or not there should be a regency; and a regency was negatived by fifty-one votes against forty-nine. The lords then voted, by fifty-three to forty-six, that there was an original contract between the king and the people. They agreed, without a dissentient voice, to the commons' statement as to the misgovernment of James, but substituted the word "deserted" for "abdicated," and rejected the final and most important clause "that the throne was thereby vacant," by a majority of fifty-five to forty-one.

William announces his intentions.

William had shown his wisdom and tact by leaving the nation to settle itself. But a crisis had now arrived when it became necessary for him to explain his views. Sending for Halifax, Danby, Shrewsbury, and some other political leaders of note, he disclaimed any right or wish to dictate to the Convention, but gave them clearly to understand that he would not accept the position of regent, nor yet that of king consort with only such a share in the administration as his wife, as queen, might be pleased to allow him. If the estates offered him the crown for life, he would accept it; if not, he would return to his native country. It was only reasonable, he added, that the Lady Anne and her descendants should be preferred in the succession to any children whom he might have by any other wife than the Lady Mary (*g*).

View of the lords.

After a pre-conference between the two Houses, in which the questions between them were fully argued on both sides, the lords at length gave way. They resolved not to insist

(*g*) Macaulay, Hist., ii. 650.

on their amendment to the original vote of the commons; and proposed and carried, without a division, that the Prince and Princess of Orange should be declared King and Queen of England.

View of the commons.

It was still to be decided upon what conditions William and Mary should be made king and queen. A committee of the commons appointed to consider what steps it might be advisable to take in order to secure law and liberty against the aggressions of future sovereigns, reported (1) that the great principles of the constitution which had been violated by the dethroned king should be solemnly asserted, and (2) that a long and varied list of new laws which they enumerated should be enacted in restraint of the prerogative and for the purer administration of justice. It was proposed that the militia should be remodelled; that the duration of parliaments should be limited, and the royal prerogative of prorogation and dissolution restricted; that the royal pardon should not be pleadable to a parliamentary impeachment; that toleration should be granted to protestant dissenters; that the crime of treason should be more precisely defined, and State trials be conducted in a manner more favourable to innocence; that the judges should hold their offices for life; that juries should be nominated in such a way as to exclude partiality and corruption; with many other salutary reforms, a remarkable omission, however, being the absence of any provision in favour of the liberty of the press. In a debate on the report it was urged that legislation on so many and important subjects would delay the settlement of the nation. The list of reforms was too long, if it referred only to what ought to be accomplished before the throne was filled; too short, if it intended to include all reforms which the legislature would do well to make in proper season. It was finally decided to postpone all reforms until after the settlement of the government on its ancient constitutional basis had been accomplished, but to set forth in the instrument by which the Prince and Princess of Orange were called to the throne, and the order of succession settled, a distinct and solemn assertion of the fundamental principles of the constitution and of the ancient franchises of the English nation; so that the right of the king to his

crown and of the people to their liberties might rest upon one and the same title-deed.

Declaration of Right.

The Declaration of Right was accordingly drawn up. It contains (1) a recital of all the illegal and arbitrary acts committed by James II.; of his abdication, and of the consequent vacancy of the throne; (2) an emphatic assertion, nearly following the words of the previous recital, that all such enumerated acts are illegal; and (3) a resolution that the crown should be settled on William and Mary for their joint and separate lives, but with the administration of the government, during their joint lives, in William alone; and after the decease of the survivor, on the descendants of Mary, then on Anne and her issue, and lastly on the issue of William. On February 13, 1688-1689, a tender of the crown, on the conditions set forth in the Declaration, was made by the Marquis of Halifax in the name of all the estates of the realm. "We thankfully accept," replied William, speaking for himself and his wife, "what you have offered us."

Tender and acceptance of the crown.

The Scottish Convention.

The Scottish estates (*gg*), which met a month later, passed resolutions framed, as far as possible, in conformity with those recently passed at Westminster. There was, however, one important deviation from the original. The English Convention, by voting a constructive abdication of the throne, had, while actually deposing a bad king, endeavoured to evade the question whether subjects may lawfully perform such an act. The Scottish Convention did not shrink from using the bolder word "forfeited." They resolved "That James VII., being a professed papist, did assume the royal power and acted as king, without ever taking the oath required by law, and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of the kingdom, and altered it from a legal limited monarchy to an arbitrary despotic power, and hath exerted the same to the subversion of the protestant religion and the violation of the laws and liberties of the kingdom, whereby he hath *forfaulied* his right to the crown, and the throne has become vacant." They also voted papists incapable of wearing the crown,

(*gg*) [This paragraph was in a footnote in the preceding edition.]

abolished episcopacy, made a claim of rights, and bestowed the crown on William and Mary, to descend afterwards in conformity with the limitations already marked out by the English Convention (*h*).

Salutary consequences of the Revolution.

Thus was accomplished the "glorious Revolution" of 1688, of all revolutions the least violent and the most beneficent. "It finally decided," says Macaulay, "the great question whether the popular element which had, ever since the age of Fitzwalter and De Montfort, been found in the English polity, should be destroyed by the monarchical element, or should be suffered to develop itself freely, and to become dominant. The strife between the two principles had been long, fierce, and doubtful. It had lasted through four reigns. It had produced seditions, impeachments, rebellions, battles, sieges, proscriptions, judicial massacres. Sometimes liberty, sometimes royalty, had seemed to be on the point of perishing. During many years one half of the energy of England had been employed in counteracting the other half. The executive power and the legislative power had so effectually impeded each other that the state had been of no account in Europe. The king-at-arms who proclaimed William and Mary before Whitehall Gate, did in truth announce that this great struggle was over; that there was entire union between the throne and the parliament; and that England, long dependent and degraded, was again a power of the first rank; that the ancient laws by which the prerogative was bounded would henceforth be held as sacred as the prerogative itself, and would be followed out to all their consequences; that the executive administration would be conducted in conformity with the sense of the representatives of the nation; and that no reform, which the two Houses should, after mature deliberation, propose, would be obstinately withstood by the sovereign. The Declaration of Right, though it made nothing law which had not been law before, contained the germ . . . of every good law which had been passed during more than a century and a half, of every good law which may here-

(*h*) Macaulay, Hist., iii. [286] ; Hallam, Const. Hist., iii. 328.

after, in the course of ages, be found necessary to promote the public weal, and to satisfy the demands of public opinion" (*i*).

The Bill of Rights.

In the second session of the Convention Parliament, which re-assembled on October 25, 1689, the Declaration of Right was embodied and confirmed, with some slight but important amendments, in a regular Act of the legislature. The text of the Bill of Rights, the third great charter of English liberty and the coping-stone of the constitutional building, is as follows (*k*):

BILL OF RIGHTS.

1 Will. and Mary, sess. 2, c. 2 (1689).

An Act Declareing the Rights and Liberties of the Subject, and Setleing the Succession of the Crowne.

I. Whereas the Lords Spirituall and Temporall and Commons, assembled at Westminster, lawfully, fully, and freely representing all the Estates of the people of this Realme, did, upon the thirteenth day of February, in the yeare of our Lord One thousand six hundred eighty-eight, present unto their Majesties, then called and known by the names and stile of William and Mary, Prince and Princesse of Orange, being present in their proper persons, a certaine Declaration in writeing, made by the said Lords and Commons, in the words following, viz:—

Illegal acts committed by the late King James II.

Whereas the late King James II. by the advice of diverse evill councellors, judges, and ministers imployed by him, did endeavour to subvert and extirpate the Protestant religion, and the lawes and liberties of this kingdome:—

1. By assumeing and exerciseing a power of dispensing with and suspending of lawes, and the execution of lawes, without consent of Parlyament.

2. By committing and prosecuting diverse worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

3. By issueing and causeing to be executed a commission under the Great Seale for erecting a court, called the Court of Commissioners for Ecclesiasticall Causes.

4. By levying money for and to the use of the Crowne, by pretence of prerogative, for other time, and in other manner than the same was granted by Parlyament.

(*i*) Macaulay, Hist., ii. [668].

[For a contrast between the Revolution of 1640 and that of 1688, *cf.* Taylor, Engl. Const., p. 601.—Ed.]

(*k*) Statutes of the Realm, vi. 142-145.

5. By raising and keeping a standing army within this kingdome in time of peace, without consent of Parlyament, and quartering soldiers contrary to law.

6. By causing severall good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and imployed contrary to law.

7. By violating the freedome of election of members to serve in Parlyament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable onely in Parlyament; and by diverse other arbitrary and illegal courses.

9. And whereas of late yeares, partiall, corrupt, and unqualifyed persons have been returned and served on juryes in tryalls, and particularly diverse jurors in tryalls for high treason, which were not freeholders.

10. And excessive baile hath beene required of persons committed in criminall cases, to elude the benefitt of the lawes made for the liberty of the subjects.

11. And excessive fines have been imposed and illegall and cruell punishments inflicted.

12. And severall grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whome the same were to be levyed.

All which are utterly and directly contrary to the knowne lawes and statutes, and freedome of this realme.

Abdication and consequent vacancy of the throne.

Summons of the Convention Parliament.

And whereas the said late King James the Second haveing abdicated the government, and the throne being thereby vacant, his Highnesse the Prince of Orange (whome it hath pleased Almighty God to make the glorious instrument of delivering this kingdome from Popery and arbitrary power) did (by the advice of the Lords Spirituall and Temporall, and diverse principall persons of the Commons) cause letters to be written to the Lords Spirituall and Temporall, being Protestants, and other letters to the several countyes, cityes, universities, burroughs, and Cinque Ports, for the choosing of such persons to represent them, as were of right to be sent to Parlyament, to meete and sit at Westminster upon the two and twentyeth day of January, in this yeare One thousand six hundred eighty and eight, in order to such an establishment, as that their religion, lawes and liberties might not againe be in danger of being subverted; upon which letters elections having beene accordingly made.

Declaration that the acts previously enumerated are illegal.

And thereupon the said Lords Spirituall and Temporall, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best meanes for attaining the ends aforesaid, doe in the first place (as their auncesters in like case have usually done) for the vindicating and asserting their auntient rights and liberties, declare:—

1. That the pretended power of suspending of laws, or the execution of laws, by regall authoritie, without consent of Parlyament is illegall.

2. That the pretended power of dispensing with laws, or the execution of laws, by regall authoritie, as it hath been assumed and exercised of late, is illegall (*l*).

3. That the commission for erecting the late Court of Commissioners for Ecclesiasticall Causes, and all other commissions and courts of like nature, are illegall and pernicious.

4. That levying money for or to the use of the Crowne by pretence of prerogative, without grant of Parlyament, for longer time or in other manner than the same is or shall be granted, is illegall.

5. That it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegall (*m*).

6. That the raising or keeping a standing army within the kingdome in time of peace, unless it be with consent of Parlyament, is against law (*n*).

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law (*o*).

8. That elections of members of Parlyament ought to be free.

9. That the freedome of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament.

(*l*) *Supra*, pp. 293 *seq.* In drawing up the Declaration of Right the lords were unwilling absolutely to condemn the dispensing power, and therefore inserted the qualifying words, "as it hath been assumed and exercised of late"; the effect of which is to reserve to the crown the prerogative of pardoning criminals or commuting their sentences. By sec. XII. of the Bill of Rights [*infra*, p. 630] the dispensing power was absolutely abolished, except in such cases as should be specially provided for by a bill to be passed during the then present session. No such bill was, however, passed.

(*m*) On the right of petitioning, see *supra*, pp. 589 *seq.* The Act 13 Car. II. c. 5, against *tumultuous* petitioning was not affected by this clause of the Bill of Rights.

(*n*) *Infra*, pp. 643 *seq.*

(*o*) This declaration (says Blackstone) of the right of the subject to carry arms proper for his defence, "is a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression." There is an ancient enactment, however (2 Edw. III. c. 3), against going armed under such circumstances as may "tend to terrify the people," or indicate an intention of disturbing the public peace; and by a modern statute (60 Geo. III. c. 1) the training of persons without lawful authority to the use of arms is prohibited; and any justice of the peace is authorised to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present.—Stephen, Commentaries (5th ed.), i. 154, and, as to the authority under which the volunteer rifle corps are trained, ii. 610.

10. That excessive baile ought not to be required nor excessive fines imposed; nor cruell and unusuall punishment inflicted.

11. That jurors ought to be duely impannelled and returned, and jurors which passe upon men in trialls for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegall and void.

13. And that for redresse of all grievances, and for the amending, strengthening, and preserveing of the lawes, Parlyament ought to be held frequently.

And they doe claime, demand, and insist upon all and singular the premisses, as their undoubted rights and liberties; and that noe declarations, judgments, doeings, or proceedings, to the prejudice of the people in any of the said premisses, ought in anywise to be drawne hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highnesse the Prince of Orange, as being the onely means for obtaining a full redresse and remedy therein.

Haveing therefore an intire confidence that his said Highnesse the Prince of Orange will perfect the deliverance soe farr advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

Bestowal of the crown on William and Mary, subject to limitations.

II. The said Lords Spirituall and Temporall, and Commons, assembled at Westminster, doe resolve, that William and Mary, Prince and Princesse of Orange, be, and be declared, King and Queene of England, France and Ireland, and the dominions thereunto belonging, to hold the Crowne and royall dignity of the said kingdomes and dominions to them the said Prince and Princesse dureing their lives, and the life of the survivor of them; and that the sole and full exercise of the regall power be onely in, and executed by the said Prince of Orange, in the names of the said Prince and Princesse, dureing their joynt lives; and after their deceases, the said Crowne and royall dignitie of the said kingdomes and dominions, to be to the heires of the body of the said Princesse; and for default of such issue to the Princesse Anne of Denmarke, and the heires of her body; and for default of such issue to the heires of the body of the said Prince of Orange. And the Lords Spirituall and Temporall and Commons, do pray the said Prince and Princesse to accept the same accordingly.

New oaths in lieu of the old oaths of allegiance and supremacy.

III. And that the oathes hereafter mentioned be taken by all persons of whome the oathes of allegiance and supremacy might be required by law, instead of them; and that the said oathes of allegiance and supremacy be abrogated.

I, A. B., doe sincerely promise and sweare, That I will be faithfull and beare true allegiance to their Majestyes King William and Queene Mary:

Soe helpe me God.

I, A. B., doe sweare, That I doe from my heart abhorr, detest, and abjure as impious and hereticall, this damnable doctrine and position, that Princes excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I doe declare, That noe forreigne prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authoritie, ecclesiasticall or spirituall, within this realme:

Soe helpe me God.

Acceptance of the crown by William and Mary.

IV. Upon which their said Majestyes did accept the Crowne and royall dignitie of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

The Convention to continue to sit.

V. And thereupon their Majestyes were pleased, that the said Lords Spirituall and Temporall, and Commons, being the two Houses of Parlyament, should continue to sitt, and with their Majestyes royall concurrence make effectual provision for the settlement of the religion, lawes, and liberties of this kingdome, soe that the same for the future might not be in danger againe of being subverted; to which the said Lords Spirituall and Temporall, and Commons, did agree and proceede to act accordingly.

Formal ratification of Declaration of Right.

VI. Now in pursuance of the premisses, the said Lords Spirituall and Temporall, and Commons, in Parlyament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due forme by authority of Parlyament, doe pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration are the true, auntient, and indubitable rights and liberties of the people of this kingdome, and soe shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majestyes and their successors according to the same in all times to come.

Recognition and declaration of their Majesties' title.

VII. And the said Lords Spirituall and Temporall, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and mercifull goodness to this nation, to provide and preserve their said Majestyes' royall persons most happily to raigne over us upon the throne of their auncestors, for which they render unto Him from the bottome of their hearts their humblest thanks and praises, doe truly, firmely, assuredly, and in the sincerity of their hearts, thinke, and doe hereby recognize, acknowledge, and declare, that King James the Second haveing abdicated the government, and their Majestyes haveing accepted the Crowne and royalle dignity aforesaid, their said Majestyes did be-

come, were, are, and of right ought to be, by the lawes of this realme, our soveraigne liege Lord and Lady, King and Queene of England, France and Ireland, and the dominions thereunto belonging, in and to whose princely persons the Royall State, Crowne, and dignity of the same realmes, with all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and intirely invested and incorporated, united, and annexed.

Settlement of the crown and limitations of the succession.

VIII. And for preventing all questions and divisions in this realme, by reason of any pretended titles to the Crowne, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquility, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spirituall and Temporall, and Commons, doe beseech their Majestyes that it may be enacted, established, and declared, that the Crowne, and regall government of the said kingdoms and dominions, with all and singular the premisses thereunto belonging and appertaining, shall bee and continue to their said Majestyes, and the survivor of them, during their lives, and the life of the survivor of them. And that the entire, perfect, and full exercise of the regall power and government be onely in, and executed by, his Majestie, in the names of both their Majestyes dureing their joynt lives; and after their deceases the said Crowne and premisses shall be and remaine to the heires of the body of her Majestie; and for default of such issue, to her Royall Highnesse the Princesse Anne of Denmarke, and the heires of her body; and for default of such issue, to the heires of the body of his said Majestie: and thereunto the said Lords Spirituall and Temporall, and Commons, doe, in the name of all the people aforesaid, most humbly and faithfully submitt themselves, their heires and posterities, for ever: and doe faithfully promise, That they will stand to, maintaine, and defend their said Majestyes, and alsoe the limitation and succession of the Crowne herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

Exclusion from the succession of papists and of persons marrying papists.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdome, to be governed by a Popish Prince, or by any King or Queene marrying a Papist, the said Lords Spirituall and Temporall, and Commons, doe further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever uncapeable to inherit, possesse, or enjoy the Crowne and government of this realme and Ireland, and the dominions thereunto belonging or any part of the same, or to have, use, or to exercise any regall power, authoritie, or jurisdiction within the same; and in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance, and the said Crowne and government shall from time to time descend to, and be enjoyed by, such

person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons soe reconciled, holding communion, or professing or marrying as aforesaid, were naturally dead (*p*).

Declaration to be made by every king or queen hereafter succeeding to the crown.

X. And that every King and Queene of this realme, who at any time hereafter shall come to and succeede in the Imperiall Crowne of this kingdome, shall, on the first day of the meeting of the first Parlyament, next after his or her comeing to the Crowne, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her takeing the said oath (which shall first happen), make, subscribe, and audibly repeate the declaration mentioned in the statute made in the thirtyeth yeare of the raigne of King Charles the Second, entituled "An Act for the more effectuall preserveing the King's person and government, by disableing Papists from sitting in either House of Parlyament." But if it shall happen, that such King or Queene, upon his or her succession to the Crowne of this realme, shall be under the age of twelve years, then every such King or Queene shall make, subscribe, and audibly repeate the said declaration at his or her coronation, on the first day of meeting of the first Parlyament as aforesaid, which shall first happen after such King or Queene shall have attained the said age of twelve years (*q*).

Enacting clause.

XI. All which their Majestyes are contented and pleased shall be declared, enacted, and established by authoritie of this present Parlyament, and shall stand, remaine, and be the law of this realme for ever; and the same are by their said Majestyes, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in Parlyament assembled, and by the authoritie of the same, declared, enacted, and established accordingly.

Dispensing power abolished.

XII. And bee it further declared and enacted by the authoritie aforesaid, That from and after this present session of Parlyament, noe dispensation by *non obstante* of or to any statute, or any part thereof,

(*p*) This provision, although not included in the Declaration of Right, was in accordance with the previous resolution of the Convention, that it was contrary to the interests of the kingdom to be governed by a papist.

(*q*) This clause supplements the preceding by enacting that every English sovereign shall, as a test of non-popery, repeat and subscribe, in full parliament or at the coronation, the declaration against transubstantiation, adoration of the Virgin, and the sacrifice of the mass, contained in the Parliamentary Test Act of the 30th Car. II. st. 2, c. 1.—See *supra*, p. 605.

[This declaration, which gave great umbrage to Roman catholics, and was regarded as unnecessarily offensive by the majority of anglican and free churchmen alike, gave rise to much acrimonious discussion on the occasions of the successions of King Edward VII. and King George V.; and in August 1910, by Act 1 & 2 Geo. V. c. 3, it was abolished in its entirety and replaced by a simple declaration of adhesion to the protestant faith. See Encyc. Brit., 11th ed., sub. Roman Catholic Church, and note to p. 497.—Ed.]

shall be allowed, but that the same shall be held void and of noe effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed dureing this present session of Parlyament.

XIII. Provided that noe charter, or grant or pardon granted before the three-and-twentyeth day of October, in the yeare of our Lord one thousand six hundred eighty nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remaine of the same force and effect in law, and noe other, then as if this Act had never been made.

Exception in favour of charters, grants, and pardons, made before Oct. 23, 1689.

IMPEACHMENT (*r*).

From the year 1621, when Sir Giles Mompesson and Lord Bacon were impeached, down to the Revolution in 1688, there were about forty cases of impeachment; under William III., Queen Anne, and George I., fifteen; and the reign of George II. was marked by one only, that of Lord Lovat, impeached in 1746 for high treason (*rr*).

The principal cases of constitutional importance since the impeachment of the Earl of Middlesex, in 1624, are the following:

George Villiers, Duke of Buckingham.—Impeached by the commons before the lords on thirteen charges, of which the most important were that (1) he had neglected to guard the high seas; (2) had lent a squadron of English ships to be employed against the Huguenots; (3) had purchased for money and monopolised in his own person several of the highest offices of state. Sir Dudley Digges, Sir John Eliot, and six other members of the commons, managed the accusation before the lords. Buckingham delivered his answer, and the commons were preparing to reply, when Charles I. dissolved parliament. In 1628 the commons presented a remonstance to the king, ascribing the evils which afflicted the kingdom to the excessive power exercised and abused by Buckingham, and prayed for his

Buckingham. 1626.

(*r*) [Transferred here from the previous edition, pp. 416-426, for reasons of greater convenience, and to permit of continuity in dealing with the reign of James I.—Ed.]

(*rr*) [*Cf.* May, Parl. Prac. (12th ed. 1917), p. 588, *n.*; and Pike, Const. Hist. House of Lords, pp. 229 *seq.*—Ed.]

removal from office and from about the king's person. Shortly afterwards Charles prorogued parliament, and during the recess Buckingham was assassinated by Felton.

Mainwaring. 1628.

Dr. Roger Mainwaring.—Impeached by the commons for three political sermons (two preached before the king), afterwards published under the title of "Religion and Allegiance." He maintained that "parliaments were not ordained to contribute any right to the king, but for the more equal imposing and easy exacting of that which unto kings doth appertain by natural and original law and justice, as their proper inheritance annexed to their imperial crowns from their birth"; and that those who refused to pay taxes and loans imposed by the king's royal command, without consent of parliament, "did offend against the law of God and the king's supreme authority, and became guilty of impiety, disloyalty, and rebellion." He was condemned by the lords to imprisonment during the pleasure of the House, to pay a fine of £1,000, to be suspended for three years from the ministry, and to be incapable of holding any office, ecclesiastical or civil. Yet Charles almost immediately pardoned him, gave him an additional rectory, and some years afterwards made him Bishop of St. David's.

Strafford. 1640.

Thomas Wentworth, Earl of Strafford.—Impeached by the commons for high treason. Of the twenty-eight articles exhibited against him, having reference to his conduct as President of the Council of the North, as Lieutenant of Ireland, as a privy councillor, and as commander of the king's army in England, one only, the 15th, charging him with levying money by his own authority and quartering troops on the people of Ireland, in order to compel them to pay, could be fairly contrued as a substantive reason—that of "levying war against the king"—within the statute of Edward III. The commons attempted to set up a principle of *cumulative* treason; but even if the evidence as to all the charges had been legally sufficient, it appeared extremely doubtful whether the crime of treason could be established. Firmly persuaded that Strafford was an enemy to his country, and, if not technically, yet to all intents and purposes, a traitor, some of the leaders of the

commons resolved to avail themselves of one of the worst precedents of the Tudor times, and to proceed by bill of attainder. Pym and Hampden opposed this course, but were outvoted; Falkland and Hyde, who shortly afterwards became the leaders of the royalist party, eagerly supported the attainder (*s*). Fifty-nine members of the commons voted against the bill when it was introduced in the Lower House, and were in consequence placarded in the streets as "Straffordians, who, to save a traitor, would betray their country." The lords requested the opinion of the judges whether some of the articles of accusation amounted to treason, and received a somewhat indecisively expressed answer, which, without distinctly stating that the prisoner was guilty of treason, declared that "they were of opinion, upon all which their lordships had voted to be proved, that the Earl of Strafford doth deserve to undergo the pains and forfeitures of high treason by law." Apprehension of popular tumult prevented more than forty-five peers from attending at the passing of the bill (May 7, 1641), and of these, nineteen voted against it. In the midst of violent anxiety and doubt, Charles I. weakly and ungenerously gave the royal assent, thus sacrificing the man who had so faithfully served him, and whom he had promised that "not a hair of his head should be touched." "The execution of Strafford," as is remarked by Earl Russell (*t*), "casts a stain upon all parties in the state. The House of Commons were instigated by passion; the House of Lords acted from fear; and Charles from some motive or other, which, at all events, was not the right one. The admission of the mob to overawe the deliberation of parliament was a sure sign that law was about to be subverted."

Archbishop Laud.—Impeached for high treason in March, 1641, and sent to the Tower, where he remained until his death. In October 1643, specific articles were exhibited against him, relating partly to religious matters and partly to the violent proceedings in the Star Chamber and High Commission Court, in which as a councillor he Laud. 1641.

(*s*) See Forster, Historical and Biographical Essays, i. 252.
(*t*) English Government and Constitution, p. 66.

had borne a very prominent part. The charges may be summed up under the three heads of endeavouring (1) to subvert the fundamental laws of the realm and introduce arbitrary government; (2) to subvert true religion and introduce popery; and (3) to subvert the rights of parliament. After a long trial and the examination of more than 150 witnesses, there appeared so little likelihood of obtaining a judicial condemnation, that the commons changed their impeachment into an ordinance (or bill) of attainder. The peers consulted the judges, who answered "that they could deliver no opinion in this case in point of law, because they could not deliver any opinion in point of treason but what was particularly expressed to be treason in the statute of 25 Edward III., and so referred it wholly to the judgment of this House" (*u*). This was tantamount to a declaration that the charges contained no legal treason; but the peers (twenty only were present) passed the bill: and the archbishop was beheaded on the 10th January, 1644-1645.

Clarendon. 1667.

Edward Hyde, Earl of Clarendon, the lord chancellor and chief minister of Charles II. from the Restoration till his own fall.—Impeached on a "general" charge of high treason. Of the seventeen articles against him, the most important were the first, the fourth, and the eleventh; viz. (1) "That the Earl of Clarendon hath designed a standing army to be raised, and to govern the kingdom thereby, and advised the king to dissolve this present parliament, to lay aside all thoughts of parliaments for the future, to govern by a military power, and to maintain the same by free quarters and contributions." (4) That he "advised and procured divers of his Majesty's subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law and to procure precedents for the imprisoning any other of his Majesty's subjects in like manner" (*w*). (11) That he had advised and effected the sale of Dunkirk

(*u*) Lords' Journal., 17 Dec. 1644.

(*w*) [This charge was undoubtedly true. The arbitrary proceedings of Lord Clarendon gave rise to an agitation which ultimately led to the enactment of the Habeas Corpus Act, in 1679.—Ed.]

(won by Oliver Cromwell from Spain), for a sum much below its value, to Louis XIV. of France.

The lords, declining to follow the precedent of Strafford's case in favour of a "general charge" of treason (which the commons had endeavoured to get up by using the word "traitorously" in their impeachment), refused to commit Clarendon to the Tower. He fled from justice. In his absence an Act was passed (19 & 20 Car. II. c. 2) commanding him to surrender for trial within a limited time, and in default of appearance banishing him for life, subjecting him to the penalties of high treason if he returned to England, and rendering him incapable of pardon, except by Act of Parliament. Illness prevented Clarendon from appearing within the prescribed time to take his trial, and he died in exile at Rouen in 1674.

Danby. 1679.

Thomas Osborne, Earl of Danby.—Impeached for high treason and other high crimes and misdemeanours. The principal charge against him was his having written a letter to Montagu, the English minister at the Court of Versailles, empowering him, only five days after an Act had been passed to raise supplies for carrying on the war with France, to make an offer of neutrality between France and Holland for the price of 6,000,000 livres.

Constitutional points.

The impeachment of Danby brought forward several points of great constitutional importance:

(1) The letter to Montagu had been most unwillingly written by Danby at the express command of King Charles II., who, to satisfy the scruples of his minister, had even subjoined a postscript in his own handwriting "This letter is writ by my order, C. R." As the king's authority for the letter was undeniable, "the commons," as Hallam has observed, "in impeaching Lord Danby, went a great way towards establishing the principle (recognised by the modern theory of the constitution) that no minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign," but is answerable "for the justice, the honesty, the utility of all measures emanating from the crown, as well as for their legality"; thus rendering the executive administra-

tion "subordinate, in all great matters of policy, to the . . . virtual control of the two Houses of Parliament" (*x*).

(2) As in the previous instance of Lord Clarendon, a difference arose in this case between the lords and commons as to committing the accused to the Tower. The charges against Danby, as specified in the articles of impeachment, could not be brought within any reasonable interpretation of the statutes relating to treason, and manifestly amounted to no more than a misdemeanour. After an adjourned debate, the lords refused to commit Danby to the Tower merely on the "general charge" contained in the word "traitorously," and in the absence of a specific allegation of some overt act of treason. Parliament was shortly afterwards prorogued, and then dissolved; but the next House of Commons revived the impeachment, and the lords then, of their own motion, ordered the Usher of the Black Rod to take the accused into custody. Although the lords thus receded from the position which they had originally taken up, their opposition in this case may be said to have checked the practice of general impeachments.

(3) Another point raised in this case was the right of pleading the king's pardon in bar of a parliamentary impeachment. On being called upon to give in his written answer to the charges of the commons, Danby pleaded a pardon, secretly obtained from the king, in discharge of all the offences of which he was accused. The commons alleged "that there was no precedent that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, depending the impeachment"; and resolved "that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England" (*y*). The question was not settled on this occasion, as parliament was prorogued, and the impeachment was not afterwards revived. On both legal and political grounds the commons would seem to have been right in their contention. Although the king's prerogative to grant a pardon, even

(*x*) Const. Hist., ii. 408.
(*y*) Com. Journ., 28 April and 5 May, 1679.

before trial, was undoubtedly in all ordinary criminal proceedings by indictment at the king's suit, it was equally undoubted that in any "appeal" or prosecution for felony, not at the suit of the king, but of the injured party or his next of blood, the king had no power to remit the capital sentence (*z*). If the king could not deprive a private individual of his remedy at law, much less could he stop an impeachment at the suit of the whole commons of England. And on political grounds it was clear that if the plea of the accused were admitted, there would be an end to the pretended responsibility of the ministers of the crown, who by the intervention of prerogative might be screened from the inquiry and justice of parliament. Directly after the Revolution the commons again voted that "a pardon is not pleadable in bar of an impeachment" (*a*); but the question was not finally decided till the Act of Settlement (12 & 13 Will. III. c. 2) declared "that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament." The right of the crown to reprieve or pardon after sentence remains, however, unaffected. James I. had remitted the whole sentence on Lord Chancellor Bacon; and after the impeachment and attainder of the six Scottish lords concerned in the rebellion of 1715, three of them received the king's pardon. Indirectly, the commons possess the power of pardoning by refusing to demand judgment after the lords have found the accused guilty: for no judgment can be pronounced by the lords till after it has been demanded by the commons (*b*).

(4) The right of the bishops to sit and vote on the trial of peers in capital cases was another question raised by the impeachment of Lord Danby. It was admitted that by ancient custom—originating in a claim of privilege by the church—the bishops never voted on judgment of death. But the commons contended that as the final judgment

(*z*) *Cf. supra*, p. 110.

(*a*) Com. Journ., 6 June, 1689.

(*b*) See May. Parl. Prac. (12th ed. 1917), p. 590. ["The power of the crown to pardon," says Pike, Const. Hist. House of Lords, p. 233, "after the lords have given judgment, is not affected by these words (in the Act of Settlement); but no pardon can be interposed between impeachment by the commons and trial by the lords."—Ed.]

often depends upon the preliminary proceedings—as in this case upon the validity of Danby's plea of a pardon in bar—the bishops ought not to vote on such preliminary proceedings. The lords, however, passed a resolution, which has ever since been adhered to, "that the lords spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty." This is in conformity with the 11th chapter of the Constitutions of Clarendon (11th Hen. II.), which expressly required the bishops to be present on trials, but, in deference to the canon law, excused them from voting when it came to a question of life or limb ("episcopi, sicut caeteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem" (*c*)). The limited exclusion of the bishops applies only to purely judicial proceedings. They are fully entitled to vote at every stage of a bill of attainder, which, though judicial in substance, is in form a legislative act—even though it affect the life of the person attainted. In the attainder of Sir John Fenwick, in 1696, the bishops voted in all the proceedings, including the final question for the passing of the bill.

(5) Another point raised for the first time on the trial of Lord Danby, was, whether an impeachment abated on the prorogation or dissolution of Parliament? In 1673 a committee of the lords, appointed to inquire whether "appeals, either by writ of error or petition, from the proceedings of any other court, being depending and not determined in one session of parliament, continue *in statu quo* until the next session," had reported in the affirmative, and their report had received the confirmation of the House. In March 1678-1679, a similar decision was come to by the lords with regard to the effect of a dissolution of parliament, as distinguished from a prorogation from session to session. It was also resolved (with special reference to Lord Danby's case) "that the dissolution of the last parliament did not alter the state of the impeachments brought up by the commons in that parliament" (*d*). This con-

(*c*) *Supra*, p. 89.
(*d*) Lords' Journ., March 18, 19, 1678-1679.

tinued to be the law of parliament until 1685, when, in order to secure the escape of the "popish lords" then under impeachment, the previous resolution was reversed and annulled (*e*). The lingering impeachment of Lord Danby, which had been continued by the first decision, was put an end to by the last. He had suffered five years' imprisonment in the Tower, not being admitted to bail until 1684. He subsequently took an active part in public affairs under William III., by whom he was created Marquis of Carmarthen, and, in 1694, Duke of Leeds. In 1695 he was again impeached by the commons on a charge of corruption; but the session being suddenly prorogued, no further proceedings were taken. He died in 1712. The question of abatement was not finally settled until 1791, when a dissolution having intervened during the impeachment of Warren Hastings, it became necessary for parliament to review the precedents of former impeachments and to pass its judgment on the contradictory decisions of the lords. After full discussion, it was voted in both Houses, by large majorities, that by the law and custom of parliament an impeachment pending in the House of Lords continued *in statu quo*, from one session and from one parliament to another, until a judgment shall have been given (*f*).

Fitzharris, 1681.

Edward Fitzharris. Impeached by the commons for high treason. Their real object was to elicit disclosures of a pretended "popish plot," and so aid the progress of the Exclusion Bill against the Duke of York. In order to prevent the commons from interfering in the prosecution, Charles II. had already instructed the attorney-general to proceed against Fitzharris in the King's Bench for a treasonable libel. The attempt of the commons to take the prosecution out of the hands of the court party brought into discussion an important point of constitutional law,

(*e*) *Ibid.*, May 22, 1685.

(*f*) Pike, Const. Hist. House of Lords, p. 233, remarks, "It may, perhaps, also be considered a general principle that neither prorogation nor dissolution of Parliament will put an end to *impeachment* by the *commons before the lords*." In the cases of Warren Hastings and Viscount Melville (*cf. infra*, p. 643), special Acts of Parliament were passed to remove all doubt on the matter, and "it is not improbable that these precedents would be followed upon any future impeachment, as each of these Acts had reference only to the particular case under consideration at the time."—*Ibid*, p. 234.—ED.]

namely, whether a commoner could be impeached for a capital offence. The lords, in the interest of the court, voted that "Fitzharris should be proceeded with according to the course of common law, and not by way of impeachment." The grounds of their decision were not stated; but the fact of his being a commoner appears to have been mainly relied on. They were supported by a supposed authority in the case of Sir Simon de Beresford in the 4th Edward III. Sir Simon, however, was not impeached by the commons, but charged before the lords, *at the suit of the crown*, of participation in the treason of Roger Mortimer. After giving judgment against him, the lords made a declaration (which, as being made "with the assent of the king, in full parliament," has been regarded by some as a statute), "that the aforesaid judgment be not drawn into example or consequence in time to come, whereby the said peers may be charged hereafter to judge other than their peers, contrary to the law of the land" (*g*). Even if this declaration amounted to a statute, which was doubtful, it clearly applied to cases similar to that of De Beresford, and not to an impeachment at the suit of the commons. In subsequent cases the lords had violated not only their own declaration; but also Magna Carta and the common law, by trying commoners for capital offences at the suit of the crown. But an impeachment by the commons is a proceeding of a totally distinct character. The reign of Richard II. afforded several precedents of the impeachment of commoners; and the right had been exercised, without question, so recently as the time of Charles I. The commons met the decision of the lords by voting it "a denial of justice, a violation of the constitution of parliament, and an obstruction to the further discovery of the popish plot, and that if any inferior court should proceed to the trial of Fitzharris, it would be guilty of a high breach of the privileges of the House of Commons." The king shortly afterwards dissolved parliament, and the prosecution of Fitzharris by indictment in the King's Bench was proceeded with. He pleaded in abatement that an impeachment was then pending against

(*g*) Rot. Parl. ii. 53, 54.

him for the same offence, but the plea was disallowed, and he was found guilty and executed (*h*).

The unconstitutional theory of the lords put forward in the isolated case of Fitzharris has been superseded by a later decision. After the Revolution, in 1689, Sir Adam Blair and four other commoners were impeached of high treason in having published a proclamation of James II. A committee was appointed to search for precedents; and after full deliberation, and rejecting a motion requiring the opinion of the judges, the lords came to a resolution to proceed on the impeachments (*i*).

Portland, Orford, Halifax, and Somers, 1701.

William Bentinck, Earl of Portland; Edward Russell, Earl of Orford; Charles Montagu, Earl of Halifax; and *John, Lord Somers*, four Whig peers impeached for high treason by a tory House of Commons for their share in promoting the Spanish partition treaties in 1700, and for other alleged illegal practices. The two Houses quarrelled as to the time and mode of the trial; and as the commons refused to appear on the day appointed to bring forward their evidence, the impeached ministers were acquitted (*k*). There was probably some foundation for several of the minor charges, but few have pretended to justify the impeachments, which, as Hallam observes, "have generally been regarded as a disgraceful instance of party spirit."

Dr. Sacheverell, 1710.

Henry Sacheverell, rector of St. Saviour's, Southwark, impeached by the commons for two sermons preached, the one at Derby, the other at St. Paul's, in which he inculcated the doctrine of unlimited passive obedience. A prosecution characterised by Hallam (*l*) as "of high importance in a constitutional light, and not only the most authentic exposition, but the most authoritative ratification, of the principles upon which the Revolution is to be defended." "The managers appointed by the House of Commons," says Lockhart, an ardent Jacobite, "behaved with all the insolence imaginable. In their discourse they boldly asserted, even in her Majesty's presence, that, if the right to the crown was hereditary and indefeasible, the

(*h*) 8 Howell, St. Tr. 326.
(*i*) Lords' Journ., xiv. 260; May, Parl. Prac. (12th ed. 1917), p. 588.
(*k*) 14 St. Tr. 233.
(*l*) Const. Hist., iii. 204.

prince beyond seas (meaning the king), and not the queen, had the legal title to it, she having no claim thereto but what she owed to the people; and that by the Revolution principles, on which the constitution was founded, and to which the laws of the land agreed, the people might turn out or lay aside their sovereigns as they saw cause. Though, no doubt of it, there was a great deal of truth in these assertions, it is easy to believe that the queen was not well pleased to hear them maintained, even in her own presence, and in so solemn a manner, before such a great concourse of her subjects. For, though princes do cherish these and the like doctrines whilst they serve as the means to advance themselves to a crown, yet, being once possessed thereof, they have as little satisfaction in them as those who succeed by an hereditary unquestionable title" (*m*). The lords found Sacheverell guilty by 67 votes to 59; but passed only a slight sentence, of suspension from preaching for three years, and that his sermons should be burnt by the hands of the common hangman. Queen Anne afterwards rewarded him with the rich living of St. Andrew's, Holborn. He died in 1724.

Oxford, Bolingbroke, and Ormond, 1715.

Robert Harley, Earl of Oxford; Henry St. John, Viscount Bolingbroke; and *James Butler, Duke of Ormond.* Tory ministers impeached by the commons for their share in negotiating the Peace of Utrecht, in 1713. Bolingbroke and Ormond fled to France, and were attainted in their absence. Oxford alleged in justification the immediate commands of the sovereign for what he had done, a defence which though it had failed to shelter Danby, and would not be tolerated now, found many supporters in the then unsettled state of the theory of ministerial responsibility. After two years' imprisonment in the Tower, Oxford was set at liberty, the commons, unable to agree with the lords as to the mode of procedure, having declined to continue the prosecution.

This is the last instance of purely political impeachment. Constantly responsible to parliament, ministers have been restrained from the commission of the graver class of

(*m*) Lockhart Papers, i. 312.

offences, and for minor errors of policy or conduct the loss of power has proved a sufficient punishment.

Warren Hastings; Lord Melville.—"The last hundred years," says May (*n*), "present but two cases of impeachment—the one against Mr. Warren Hastings, on charges of misgovernment in India, the other against Lord Melville (in 1804), for alleged malversation in his office. The former was not a minister of the crown, and he was accused of offences beyond the reach of parliamentary control; and the offences charged against the latter had no relation to his political duties as a responsible minister." Warren Hastings, 1788. Melville, 1804.

STANDING ARMY (*o*).

The military force in England had long consisted of two kinds of troops, which may be classified as constitutional and non-constitutional.

(1) The constitutional forces, consisting of (a) the feudal militia, bound by the tenure of their lands to serve the king both at home and abroad (summoned for the last time to render personal service in the expedition of Charles I. against the Scots in 1640, and extinguished by the Act 12 Car. II. c. 24, abolishing the military tenures), and (b) the allodial or national militia, bound exclusively to service at home, and already sufficiently described (*p*). Two kinds of troops.

(2) The non-constitutional forces were also of two kinds: (a) those of a more or less permanent character, such as the small *body guard* of the sovereign (*q*) and the *garrisons*, insignificant in number, maintained in a few fortified places—the Tower of London, Portsmouth, Dover, Tilbury, and, before the union of the crowns, Berwick and some other places on the Scottish border: (b) those raised for special emergencies, comprising the *stipendiary troops*, which even in feudal times were regularly employed by English kings for the purposes of foreign warfare, and the levies raised by *compulsory conscription*. Conscripts.

(*n*) May, Const. Hist., ii. 93.

(*o*) [Transferred here from the note in the previous edition, pp. 510-513, for reasons of greater convenience.—Ed.]

(*p*) *Supra*, pp. 55, 56, 86, 168 *seq.*

(*q*) *Supra*, p. 344.

Edward I. and Edward II. on several occasions had recourse to compulsory conscription. But this was clearly illegal; and accordingly the first parliament of Edward III. passed a statute (1 Edw. III. c. 5), "That no man from henceforth should be charged to arm himself otherwise than he was wont in the time of the king's progenitors; and that no man be compelled to go out of his shire but when necessity requireth and sudden coming of strange enemies into the realm; and then it shall be done as hath been used in times past for the defence of the realm." This statute Edward endeavoured to evade by calling, not on individuals, but on the counties and chief towns to furnish him with troops. The parliament met this new demand by a statute (25 Edw. III. c. 8) providing "that no man shall be constrained to find men-at-arms, hobblers, nor archers, other than those who hold by such service, if it be not by common consent and grant in parliament." Both these statutes were confirmed in the fourth year of Henry IV. (c. 13). For some time compulsory levies for foreign warfare were discontinued, and a system of contracting with men of rank and influence to raise troops at a high rate of pay was adopted. But as the great cost of stipendiary troops caused our kings to disband them as soon as the particular necessity for which they were engaged had ceased, the country escaped the danger of a standing army.

Troops raised by contract.

Under the despotic sway of the Tudors the prerogative of pressing men for military service out of the kingdom was to some extent revived. Its exercise by Charles I. called forth, as we have seen, the declaratory statute against impressment of the sixteenth year of his reign (*qq*). The great object of Charles and of Strafford was to obtain a standing army; but the popular party in parliament, aware that the free states of the continent had been turned into despotisms through this very means, offered a determined opposition. The outbreak of the Civil War ultimately turned upon the question who should command the military forces; and it was in the Civil War that the system of standing armies in this country originated. By the "Instrument of Government," in 1653, which invested Cromwell with the title of

Compulsion under the Tudors.

(*qq*) [*Supra*, p. 560 *n.*]

"His Highness the Lord Protector," provision was made for the support of a regular army of 30,000 men; and the military subjection in which Cromwell held the country excited amongst all parties a deep-rooted antipathy to a standing army. At the Restoration the people clamoured for the disbandment of the army of the Commonwealth, to which Charles II. somewhat reluctantly assented. General Monk's foot regiment (the Coldstream) and one other of horse were, however, retained in the king's service; another was formed out of troops brought from Dunkirk; and these, amounting in 1662 to 5,000 men, formed, under the name of guards, the nucleus of the present regular army. Standing army during the Civil War.

Towards the end of Charles II.'s reign, in 1684, the garrison of Tangier (consisting of one regiment of horse and two of foot) was recalled to England, and raised the numbers of the regular force to about 7,000 foot and 1,700 cavalry and dragoons. James II. endeavoured to make himself absolute by means of a great standing army. Taking advantage of Monmouth's insurrection, he made large additions to the military force left by his brother, and brought up their numbers to about 30,000 men. He formed a vast camp at Hounslow for the purpose of overawing London, and induced the judges to pronounce sentence of death on deserters, contrary to both the letter and spirit of the law. But under both Charles II. and James II. the parliament took every opportunity of opposing the permanent retention of the troops which were necessarily raised from time to time for special purposes. When, in 1667, 12,000 fresh troops were hastily levied for the Dutch war, the commons at once came to an unanimous resolution to request the king to disband them immediately on the conclusion of peace. Similarly, in 1673, after fresh levies had been raised for the second Dutch war, the commons resolved "that the continuing of any standing forces in this nation, other than the militia, is a great grievance and vexation to the people"; and when, in 1678, Charles II. suddenly levied 20,000 men, on the pretext of a war with France, the commons only consented to vote supplies on condition that these troops should be disbanded. One of the principal articles of Clarendon's impeachment was that he had Standing army under Charles II. and James II.

advised "the raising of a standing army and to govern the kingdom thereby" (*r*).

Declared illegal by Bill of Rights.

The illegality of raising or keeping a standing army within the kingdom in time of peace, except with consent of parliament, is expressly declared by the Bill of Rights (*rr*).

The Mutiny Act.

This declaration has been regularly repeated in the Mutiny Act (passed for the first time in 1688, for one year only, and annually renewed ever since), together with the further declaration "that no man can be forejudged of life and limb, or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by judgment of his peers and according to the known and established laws of this realm." Then follow provisions for embodying an army for the safety of the kingdom and its dependencies, and authorising the sovereign to make articles of war for the government of the troops by martial law.

Prejudice against a standing army after the Revolution.

Although the maintenance of a military force has been absolutely dependent, since the Revolution, upon the will of parliament, so strong was the national prejudice under William III. against a standing army, that in 1697, after the Peace of Ryswick, the commons insisted upon the dismissal of the king's Dutch guards, and on the reduction of the number of troops to 7,000 (afterwards increased to 10,000) for the defence of England and 12,000 for Ireland. The great victories of Marlborough reconciled the nation somewhat to the idea of a standing army; and it was, moreover, necessary during the life of the Pretender, in order to prevent the Scottish and other adherents of the exiled Stuarts from rising in rebellion; yet, under George I. and down to the close of the eighteenth century, the ordinary peace establishment, exclusive of the troops in Ireland, but including the garrisons of Minorca and Gibraltar, only slightly exceeded 17,000 men. In 1731, parliament manifested its jealousy of the military power by passing an Act (8 Geo. II. c. 30) forbidding any troops to come within two miles of any place, except the capital or a garrison town, during an election. In the same spirit, the commons resolved, in 1741, consequent upon the military having been

(*r*) *Supra*, p. 634. [See Maitland, Const. Hist., pp. 455, 456.]
(*rr*) [*Supra*, p. 626.]

called in to quell some riotous proceedings at a Westminster election, "that the presence of a regular body of armed soldiers at an election of members to serve in parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom"; and the persons concerned in the matter were ordered to attend the House, and received on their knees a severe reprimand from the Speaker.

The nation reconciled to a standing army after the Peninsular War.

The French Revolution and the Peninsular War not only finally reconciled the nation to a standing army, but excited a desire in many—the country gentlemen especially—for a very large permanent force. In proposing for the peace establishment of the United Kingdom, in 1816, an army of 50,000 men (in addition to 100,000 to be distributed among the colonies, reliefs, France and India), the ministers of the crown said: "It was rendered necessary, first on account of the increase of the military establishments of continental states, and the necessity of preserving our station among the Powers of Europe; and, secondly, because of the increase of population, and the military services required in collecting the revenue and executing the laws." "These reasons," observes Earl Russell (*s*), "may serve as a guide to teach the people of England for what purposes an army ought *not* to be kept up. They afford a limit and a rule for the amount of our military force. As long as the numbers of the army can be proved to be indispensable for maintaining garrisons in fortified places and preserving a nucleus for war, the nation may consider general harangues against a standing army as puerile declamation; but when they hear it urged that it is necessary to assimilate our peace establishment to that of the continental Powers, and that a large army is rendered necessary by the increase of our population, then it is time for them to rouse themselves and shake off, before it is too late, the burthen of a military government." The vast scale upon which warfare has been conducted in recent years, has, of course, rendered it necessary that the "nucleus," even for purely defensive purposes, should be much larger than formerly (*t*).

(*s*) Eng. Const., 281.

For footnote (*t*) see page 648.

[Since 1890, successive governments, through their ministers of war, have been busy with schemes (some of which were short-lived) for the reorganisation of the British military forces, so as to adapt them more or less to the altered conditions and exigencies of modern warfare. Great Britain alone of all the Great Powers of Europe has, partly owing to reliance on its maritime ascendancy, and partly to an accepted unwillingness (though this has never been ascertained) on the part of the people to submit to the burden of universal military service (conscription), been slow to welcome any departure from her ancient and obsolete military régime. The first of these attempts to make the army a more or less national institution was that inaugurated by the Army Administration Act of 1890 (*u*). A committee appointed in this year by both Houses of Parliament to advise on the question of army reform, having for its president the Duke of Devonshire, issued a report, the result of which was a re-arrangement of the military command upon a new basis. The proposals embodied in the report were carried into effect in 1895, and a Committee of Imperial Defence, with a cabinet minister as its president, superseded the office of commander-in-chief, and, in its place, an Army Council was appointed to deal with essentially executive matters. The change was one of far-reaching import. The commander-in-chief hitherto represented the sovereign as the supreme general of the forces; and the delegation to the Imperial Defence Committee of the cabinet of the control and inspection of the military forces of the realm carried with it a recognition of the standing army as a national institution. The office of commander-in-chief was now no longer a representative office; it became an executive post, the occupier of which was amenable and responsible to the committee for his conduct of the affairs entrusted to him, and through the committee to parliament, whilst he was himself a member of the committee. The Imperial Defence Committee was then formed into a

Army Administration Act, 1890.

Imperial Defence Committee.

(*t*) *Cf.* Earl Russell, Eng. Const., 269-281; Hallam, Middle Ages, i. 263, iii. 45, 46; Const. Hist., iii. 104-106, 256-260; Macaulay, Hist. Eng. (Works, ed. 1866), i. 94-97, 227-233, 525, 526, iv. 331-349; [Maitland, Const. Hist., p. 457.]

(*u*) See *supra*, p. 176.

government department. This system was framed on a German model, the Landes-Vertheidigungs-Commission, which corresponds more or less to our Committee of National Defence, as does the German office of chief of the general staff to that of the commander-in-chief. With the retirement of the Duke of Cambridge in 1895, the old office of commander-in-chief came to an end, and the new order commenced. With this change, a new era in the history of our national defences began; the standing army became the national army, and the auxiliary forces, including the old feudal militia, were practically merged into it. Under this new army organisation scheme, the then Secretary for War, Mr. Arnold-Forster, proposed to divide the regular army into two parts: (1) the general service army, and (2) the home service army. The former, being designed for foreign service, to consist of men joining the colours for a period of long service—six months at a depot, eight and a-half years on active service, and three years with the reserve; the home service army to be territorialised and be made up of troops raised by enlistment, together with certain numbers of militia battalions.

This scheme had not yet been put into operation, when an alteration of the helm of state from the unionist to the liberal side brought a fresh change. The succeeding minister for war, Mr. (now Lord) Haldane, at once introduced new ideas, which, incorporated in a bill, speedily became law. The Territorial and Reserve Forces Act, 1907 (7 Edw. VII. c. 9), presents the following main features. It provides for: (a) An active field force of 168,000 officers and men, composed of regulars, regular reserves, and a special reserve; (b) a special contingent of 80,000 men, recruited from the old militia, which, like the active field force, is also liable to service abroad; and (c) a territorial army, composed of volunteers and yeomanry, the numbers of which (though they have never reached that figure) are fixed at 315,000. The men in this force enlist for four years, but are not liable to foreign service. The duty of raising and administering the territorial force is vested in county associations, which are composed (1) of officers from the territorial army in the county in question; (2) of repre-

Territorial and Reserve Forces Act.

sentatives of the county and borough councils, nominated by the Army Council; (3) a president, vice-president, and chairman, nominated by the Army Council; and (4) a secretary and treasurer. The necessary drill halls, rifle butts, and other material and equipment, as part and parcel of the organisation, are provided by the county association. The regular army suffered in numbers in consequence of these innovations, many units having to be disbanded in order to make the arrangements complete. The old historical militia does not constitute a portion of the territorial force. As above seen, it is associated, as a "special reserve," to the battalions of the regular troops, to which it locally belongs. This Act (7 Edw. VII. c. 9) finally submerged this old constitutional force, which has now ceased to exist. It was scarcely possible to believe that the present régime would be lasting. Voices, in military and lay circles alike, united in condemning the whole military organisation as thus established, and claiming that universal military service—now that the old establishment was swept away—was the only logical and practical solution of a system of military warlike equipment which would enable the country to be prepared for emergencies. During the Great War, conscription was introduced into Great Britain and several of the colonies (*w*).—Ed.]

(*w*) [*Cf.* Military Service Act, 1916 (5 & 6 Geo. 5, c. 104); Military Service Act, 1916 (Session 2) (6 & 7 Geo. 5, c. 15); Military Service (No. 2) Act, 1918 (8 Geo. 5, c. 5); and the regulations made thereunder (Statutory Rules and Orders, 1916, Nos. 53, 54, 210, 342, 343).]

CHAPTER XVI.

PROGRESS OF THE CONSTITUTION SINCE THE REVOLUTION.

THE ACT OF SETTLEMENT—THE CABINET SYSTEM—ALIENS.

The legal code of the constitution.

The Revolution of 1688 marks at once a resting-place and a fresh point of departure in the history of the English Constitution. The Bill of Rights was a summing up, as it were, and final establishment of the legal bases of the constitution. With Magna Carta and the Petition of Right it forms the legal constitutional code to which no additions of equal importance (except the constitutional provisions of the Act of Settlement to be presently noticed) have since been made by legislative enactment. Political progress has indeed, from time to time, left its mark on the statute-book, in laws the importance of which can hardly be exaggerated. But even the greatest of these enactments—the Reform Act of 1832, supplemented by the Act of 1867—have been of the nature of amendments to the machinery of the constitution, supplying defects and correcting abuses, rather than alterations in the great constitutional principles finally established by the Revolution.

Growth of the unwritten or customary constitution.

As might, however, be expected in a living organism, the constitution has not remained stationary during a period of upwards of two centuries. But its greatest changes have not been brought about by legislative enactments. Whilst the legal code has remained substantially unaltered, there has grown up by its side a purely unwritten and conventional code (*a*), which, firmly established as a part of the constitution though still unknown to the law, has

(*a*) See Freeman, Growth of Eng. Const., p. 112.

so completely modified the practical working of the legal code, as to form a present constitution which would be scarcely recognisable, except in its fundamental principles, by the authors of the Bill of Rights. The doctrines of divine hereditary right, of absolute royal power, of the passive obedience of the subject, were negatived once and for ever by the Revolution, and the rule of parliament was definitely established; but the mode of exercising that rule has since become something wholly different from what it then was, and in its present form of parliamentary government through a cabinet ministry, forms the main characteristic of our constitutional system.

Act of Settlement, 1700-1701.

The history of this remarkable development has now to be briefly considered, but before doing so, it will be convenient to set out the text of the Act of Settlement (12 & 13 Will. III. c. 2), a statute important not only on account of the group of constitutional provisions embodied in it, which were to take effect from the accession of the House of Hanover, but also as the title-deed of the reigning dynasty, and a veritable original contract between the crown and the people (*b*).

ACT OF SETTLEMENT.

12 & 13 Will. III. c. 2 (1700 and 1701).

An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject (*c*).

Recital of Stat. 1 W. & M. sess. 2, c. 2, § 2;

Whereas in the first year of the reign of your Majesty, and of our late most gracious Sovereign Lady Queen Mary (of blessed memory), an Act of Parliament was made, intituled, *An Act for Declaring the Rights and Liberties of the Subject, and for settling the Succession of the Crown*, wherein it was (amongst other things) enacted, established, and declared, that the Crown and Regall Government of the

(*b*) The Act of Settlement is characterised by Hallam (Const. Hist., iii. 196) as "the seal of our constitutional laws, the complement of the Revolution itself and the Bill of Rights, and the last great statute which restrains the power of the crown." ["There is perhaps no more fruitful and instructive parallel than the comparison of this structure in the eighteenth century with that existing at the close of the fifteenth."—Gneist, Const. Hist. Engl. p. 627, note.—Ed.]

(*c*) Rot. Parl., 12 & 13 Gul. III., p. 1, n. 2; Revised Statutes, ii. 93.

Kingdoms of England, France, and Ireland, and the Dominions thereunto belonging, should be and continue to your Majestie and the said late Queen, during the joynt lives of your Majesty and the said Queen, and to the survivor: And that after the decease of your Majesty and of the said Queen, the said Crown and Regall Government should be and remain to the heirs of the body of the said late Queen: and for default of such issue, to her Royall Highness the Princess Ann of Denmark and the heirs of her body: and for default of such issue, to the heirs of the body of your Majesty. And it was thereby further enacted, That all and every person and persons that then were or afterwards should be reconciled to or shall hold communion with the See or Church of Rome, or should professe the Popish Religion, or marry a Papist, should be excluded, and are by that Act made for ever incapable to inherit, possess, or enjoy the Crown and Government of this Realm and Ireland and the Dominions thereunto belonging, or any part of the same, or to have, use, or exercise any Regall power, authority, or jurisdiction, within the same: And in all and every such case and cases the people of these Realms shall be and are thereby absolved of their allegiance: and that the said Crown and Government shall from time to time descend to and be enjoyed by such person or persons, being Protestaunts, as should have inherited and enjoyed the same in case the said person or persons so reconciled holding communion, professing, or marrying as aforesaid, were naturally dead. After the making of which Statute and the Settlement therein contained, your Majestie's good subjects, who were restored to the full and free possession and enjoyment of their Religion, Rights, and Liberties, by the providence of God giving success to your Majestie's just undertaking and unwearied endeavours for that purpose, had no greater temporall felicity to hope or wish for then [than] to see a Royall Progeny descending from your Majesty, to whom (under God) they owe their tranquillity, and whose ancestors have for many years been principall assertors of the Reformed Religion and the liberties of Europe, and from our said most gracious Sovereign Lady, whose memory will always be precious to the subjects of these Realms: And it having since pleased Almighty God to take away our said Sovereign Lady, and also the most hopefull Prince William Duke of Gloucester (the only surviving issue of her Royall Highness the Princess Ann of Denmark), to the unspeakable grief and sorrow of your Majesty and your said good subjects, who, under such losses, being sensibly put in mind that it standeth wholly in the pleasure of Almighty God to prolong the lives of your Majesty and of her Royall Highness, and to grant to your Majesty, or to her Royall Highness, such issue as may be inheritable to the Crown and Regall Government aforesaid by the respective limitations in the said recited Act contained, doe constantly implore the Divine mercy for those blessings: And your Majestie's said subjects having daily experience of your royall care and concern for the present and future welfare of these kingdoms, and particularly recommending from your throne a further provision to be made for the Succession of the Crown

and that the late queen and Duke of Gloucester are dead;

and that his Majesty had recommended from the throne a

further provision for the succession.

in the Protestant line for the happiness of the Nation and the security of our Religion; and it being absolutely necessary for the safety, peace, and quiet of this Realm to obviate all doubts and contentions in the same by reason of any pretended titles to the Crown, and to maintain a certainty in the Succession thereof to which your subjects may safely have recourse for their protection in case the limitations in the said recited Act should determine: Therefore, for a further provision of the Succession of the Crown in the Protestant line, we, your Majestie's most dutifull and loyall subjects, the Lords Spirituall and Temporall, and Commons, in this present Parlyament assembled, do beseech your Majesty that it may be enacted and declared, and be it enacted and declared by the King's most excellent Majesty, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in this present Parliament assembled, and by the authority of the same, That the most excellent Princess Sophia, Electress and Duchess Dowager of Hannover, daughter of the most excellent Princess Elizabeth, late Queen of Bohemia, daughter of our late Sovereign Lord King James the First, of happy memory, be and is hereby declared to be the next in succession in the Protestant line to the Imperiall Crown and Dignity of the said Realms of England, France, and Ireland, with the Dominions and territories thereunto belonging, after his Majesty and the Princess Ann of Denmark, and in default of issue of the said Princess Ann and of his Majesty respectively; and that from and after the deceases of his said Majesty our now Sovereign Lord, and of her Royall Highness the Princess Ann of Denmark, and for default of issue, of the said Princess Ann and his Majesty respectively, the crown and Regall Government of the said kingdoms of England, France, and Ireland, and of the dominions thereunto belonging, with the Royal State and Dignity of the said Realms, and all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining, shall be, remain, and continue to the said most excellent Princess Sophia and the heirs of her body, being Protestants: And thereunto the said Lords Spirituall and Temporall, and Commons, shall and will in the name of all the people of this Realm most humbly and faithfully submit themselves, their heirs, and posterities; and do faithfully promise that after the deceases of his Majesty and her Royall Highness, and the failure of the heirs of their respective bodies, to stand to maintain, and defend the said Princess Sophia and the heirs of her body, being Protestants, according to the Limitation and Succession of the Crown in this Act specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

The Princess Sophia as successor.

The persons inheritable by this Act.

II. Provided always and it is hereby enacted that all and every person and persons who shall or may take or inherit the said Crown by vertue of the limitation of this present Act, and is, are, or shall be reconciled to or shall hold communion with the See or Church of Rome, or shall profess the Popish Religion, or shall marry a Papist,

shall be subject to such incapacities as in such case or cases are by the said recited Act provided enacted and established: And that every King and Queen of this Realm, who shall come to and succeed in the Imperiall Crown of this kingdom by vertue of this Act, shall have the Coronation Oath administered to him, her, or them, at their respective coronations, according to the Act of Parliament made in the first year of the reign of his Majesty and the said late Queen Mary, intituled An Act for establishing the Coronation Oath, and shall make, subscribe, and repeat the Declaration in the Act first above recited, mentioned, or referred to in the manner and form thereby prescribed.

Constitutional provisions.

III. And whereas it is requisite and necessary that some further provision be made for securing our Religion, Laws, and Liberties, from and after the death of his Majesty and the Princess Ann of Denmark, and in default of issue of the body of the said Princess and of his Majesty respectively: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in Parliament assembled, and by the authority of the same:—

(1) That whosoever shall hereafter come to the possession of this Crown, shall joyn in communion with the Church of England as by law established.

(2) That in case the Crown and Imperiall Dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any warre for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of Parliament.

(3) That no person who shall hereafter come to the possession of this Crown shall go out of the dominions of England, Scotland, or Ireland, without consent of Parliament (*d*).

(4) That from and after the time that the further limitation by this Act shall take effect, all matters and things relating to the well-governing of this kingdom which are properly cognisable in the Privy Councill by the laws and customs of this Realme, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Councill as shall advise and consent to the same (*e*).

(5) That after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging, (although he be naturalised or made a denizen), except such as are born of English parents, shall be capable to be of the Privy Councill, or a member of either House of Parliament, or to enjoy any office or place of trust, either civill or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself, or to any other or others in trust for him (*f*).

(*d*) This clause was repealed by 1 Geo. I., stat. 2, c. 51.
(*e*) Repealed by 4 Anne, c. 8, s. 24. Revised Stat. 4 & 5 Anne, c. 20, s. 27.
(*f*) As to the position of aliens, see *infra*, pp. 675 *seq.*

(6) That no person who has an office or place of profit under the king, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons.

(7) That after the said limitations shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawfull to remove them (*g*).

(8) That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament (*h*).

Independence of judges.

(*g*) [This important provision, which established the independence of the judicial bench, as well as the provision in the 8th clause that the royal pardon should not be pleadable to an impeachment, had been omitted in the hasty and imperfect Bill of Rights. (*Supra*, pp. 620-1.) The judges are independent in the sense of holding their office by a permanent tenure and of being raised above the direct influence of the crown or the ministry. But the judicial department of government does not pretend to stand on a level with parliament, as its functions might at any time be modified by Act of Parliament, and such a statute would be no violation of the law. (See A. V. Dicey, Law of the Constitution, 8th ed., 1915, p. 152; and Gardiner, History of England, vol. ii. cap. 22.) The colour and working of our institutions depend on the authority and independence of the judicial bench; a good example of the maintenance of the rule of law by the judges of the land, during a period of revolutionary violence, is afforded by *Wolfe Tone's case* (1798), 2 State Trials, 614. The principle that parliament speaks only through an Act of Parliament greatly increases the authority of the judges and ensures fixity of the law. Thus a bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English bench interprets solely by reference to the words of the enactment, ignoring resolutions of either House, or anything that passed in debate, or changes which the bill may have undergone, since its first introduction, and until it received the royal assent. The supremacy of parliament is really mitigated by the fact that once it has uttered its will as lawgiver, that will becomes subject to the interpretation put on it by the judges of the land, who naturally adopt a construction, if possible, in harmony with common law principles (Dicey, Law of the Constitution (1915), pp. 402 *seq.*). In England, moreover, every individual is amenable to the rule of ordinary law and to the dominion of ordinary tribunals over which the judges of the land preside, and there is not in England, as in many countries of the continent, any separate administrative law governing the relation of individuals to the state. In connection with the independence of judges, it is to be noted that their salaries were originally charged upon the civil list, and were thus mixed up with the king's private expenditure, but are now chargeable upon the whole public revenue, not as the king's property, but as public income. (See Dicey, Law of the Constitution (1915), p. 312.)

Judges enjoy not only independence, but also immunity in the case of acts done or words said judicially though erroneously (*Hamond* v. *Howell*, 1678, 2 Mod. 218); even if the motive is malicious and the acts were not done or the words spoken in the honest exercise of their office (*Anderson* v. *Gorrie*, 1895, 1 Q. B. 668).—Ed.]

(*h*) See *supra*, pp. 636, 637.

IV. And whereas the Laws of England are the birthright of the people thereof, and all the Kings and Queens who shall ascend the throne of this Realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same; the said Lords Spirituall and Temporall, and Commons, do therefore further humbly pray, That all the Laws and Statutes of this Realm for securing the Established Religion, and the Rights and Liberties of the people thereof, and all other laws and statutes of the same now in force, may be ratified and confirmed: And the same are by his Majesty, by and with the advice and consent of the said Lords Spirituall and Temporall, and Commons, and by authority of the same, ratified and confirmed accordingly. Confirmation of the laws.

GROWTH OF THE CABINET.

The 4th and 6th of the constitutional clauses of the Act of Settlement, although repealed in Queen Anne's reign before they could come into operation, call for some detailed comment, and lead us to a consideration of the growth of cabinet government. The fourth clause was intended to put a stop to a very remarkable change which had been silently effected in the executive functions of the king's Ordinary or Privy Council; the sixth, had it not been repealed, would have entirely severed the connection between the House of Commons and the executive.

The *Concilium Ordinarium*.

Of the *Concilium Ordinarium* something has already been said in an earlier chapter of this work (*i*). Consisting of the chief officers of the court, of the two archbishops, and of certain leading members of the baronage selected by the king, the Ordinary or Continual Council was originally a kind of permanent committee of the "Great Council" or "Common Council" of the realm, sitting for the despatch of executive business during the intervals between the meetings of the larger assembly, but becoming merged in that assembly whenever it was convened. Gradually, however, the nature both of the Common Council and of the Ordinary Council underwent a change. As with the rise of the House of Commons the Common Council developed into the national parliament, the Ordinary Council tended more and more to become a strictly official body, distinct from the larger assembly out of which it had

(*i*) *Supra*, pp. 155-157, 164-165.

grown; its members ceased to be appointed exclusively from the ranks of the baronage, clerical or lay, and commoners (not necessarily members of the House of Commons) were admitted to the Council board. In 1404, under Henry IV., the Council consisted of nineteen members, of whom three were bishops, nine peers, and seven commoners. They were bound by a special oath of fidelity and secrecy, and received regular salaries of large amounts. But the Council still remained a checking as well as a ministerial body. It was at once the controller and the servant of the crown; the instrument of the king's prerogative, and the curb placed by the baronage on the arbitrary exercise of his will.

The Privy Council.

The number of councillors soon, however, appears to have proved too large for effective administration, and about the time of Henry VI. the more eminent and assiduous members were formed into a select or confidential committee, exercising alone all the administrative functions previously shared with the other members of the Ordinary Council, and distinguished from these latter by the title of privy councillors. The oath of secrecy was now only exacted from the privy councillors, the ordinary councillors being no longer consulted on purely executive business, although they continued to take part in the judicial duties of the Council in its Court of Star Chamber.

Under Edward VI., in 1553, the Ordinary Council consisted of 40 members (22 being commoners), and was divided, for judicial and administrative purposes, into five commissions or committees. The most important of these, composed of eleven noblemen, two bishops, and seven commoners (one half of the whole number of councillors), was styled the committee "for the state," and constituted, in fact, the Privy Council. The large number of commoners, both in the whole Council and in the committee "for the state," marks the change which had silently been effected in the relations between the Council and the crown. The independence of the Council had rested on the presence of men who could not easily be removed, great hereditary officials and powerful nobles. Under the Tudors the large infusion of commoners changed the nature of the Council from a mixed checking and administrative, into a purely official body, exercising the whole executive power of the

crown, and, through the medium of the Star Chamber and of proclamations, a very large part of the judicial and legislative powers also. On the abolition of the Star Chamber the judicial functions of the Council fell into abeyance, and the reason for the distinction between ordinary and privy councillors having then ceased to exist, all the members of the Council, from the date of the Restoration, were sworn as privy councillors.

The Privy Council continued to be the constitutional body of advisers of the king, whom he was bound by the laws and customs of the realm to consult. But Charles II. hated the delays and restraints imposed upon his designs by long debates in Council, and having greatly augmented its numbers was able to allege with truth that "the great number of the Council made it unfit for the secrecy and despatch which are necessary in great affairs." Availing himself of one of the peculiar characteristics of the Council —its action through committees—Charles formed a small select committee or cabinet council (*k*), with whom he concerted all measures of importance before submitting them, for a merely formal ratification, to the whole body of privy councillors. The Cabinet Council.

"Formerly," says Trenchard, writing towards the close of the 17th century, "all matters of state and discretion were debated and resolved in the Privy Council, where every man subscribed his opinion and was answerable for it. The late King Charles II. was the first who broke this most excellent part of our constitution, by settling a cabal or cabinet council, where all matters of consequence were debated and resolved, and then brought to the Privy Council to be confirmed" (*l*). The word "cabal" with the meaning of "club" or "association of intriguers" had been popularly applied to the secret councillors of the king even under James I., and the accidental coincidence

(*k*) "The . . . name of a cabinet council," says Hallam, "as distinguished from the larger body, may be found as far back as the reign of Charles I." (Const. Hist., iii. 182); but it occurs in the preceding reign in the writings of Lord Bacon, who, in treating of the "inconveniences of counsel," says, "for which inconveniences, the doctrine of Italy, and practice of France, in some kings' times, hath introduced *cabinet* counsels; a remedy worse than the disease." Bacon, Works (ed. Spedding, Ellis & Heath, 1858), vi. 424.

(*l*) Trenchard, Short History of Standing Armies, p. 2.

The "Cabal" ministry, 1671.

that, in 1671, the cabinet consisted of the five unprincipled ministers, Clifford, Arlington, Buckingham, Ashley, and Lauderdale, the initials of whose names made up the word cabal, caused the latter designation to be used for some years as synonymous with cabinet, and did much to bring the cabinet system of government into disrepute. Moreover, though convenient and even necessary for administrative purposes, cabinet government, in the form which it assumed at this period, was undoubtedly fraught with great evils. It deprived the Privy Council of all power to check the actions of the king, and vested the real government of the country in a body of ministers practically irresponsible to the nation. Accordingly, in 1679, an attempt was made, on the advice of Sir William Temple, to restore the Privy Council to its former position. It was remodelled, and its numbers reduced from fifty to thirty, of whom fifteen were the chief officers of state, and the other fifteen were made up of ten lords and five commoners. The joint income of the new Council was not to fall below £300,000, a sum nearly equal to the estimated income of the whole House of Commons. Temple hoped that a body thus constituted of great nobles and wealthy landed proprietors, too numerous for a cabal and yet not too numerous for secret deliberation, would form at once a check upon the crown and a counterbalance to the influence of parliament. By the advice of this Council of Thirty, Charles II. pledged himself to be guided in all affairs of state; but the pledge was quickly broken, and an interior or cabinet council was again formed, which differed from the whole body of the Privy Council as, under Edward VI., the committee "for the state," and under Henry VI., the Privy Council itself, had differed from the Ordinary Council (*m*).

Temple's scheme for reorganising the Privy Council, 1679.

The Cabinet system resumed.

This distinction of the Cabinet from the Privy Council has ever since continued. The Privy Council (*n*) still

(*m*) An excellent sketch of the history of the Privy Council will be found in A. V. Dicey, The Privy Council: the Arnold Prize Essay (Oxford, 1860), to which the author was indebted for several of the details in the text. [Supplementary to the foregoing work, should be compared Mr. L. O. Pike's treatment of "the Privy Council; its proceedings and jurisdictions," in Const. Hist. of House of Lords, pp. 251-252, 281, and 307-309.—Ed.]

(*n*) Since the time of Charles II. the number of privy councillors has been

remains the only legally recognised body: but the cabinet, though altogether unknown to the law, and for a long time regarded as unconstitutional and dangerous, has gradually drawn to itself the chief executive power, and become, by universal consent and usage, the essential feature of our system of parliamentary government. The firm establishment of the cabinet system has, however, only been rendered possible and advantageous by a gradual, but long since completed, change in its essential characteristics. Under the last two Stuarts the cabinet was, in truth, a cabal of the king's servants for sustaining the authority of the crown, not only against its legally authorised privy councillors, but against the wishes and power of parliament. Since the Revolution it has become a ministry (*o*) nominally appointed by the sovereign, but in reality an executive committee of the two Houses of Parliament, practically chosen by the majority of the House of Commons.

Change in its essential characteristics.

This result is mainly due to the division of the English people, and consequently of the parliament, into two great

Party government.

greatly augmented, and is now indefinite. The appointment, which confers the title of "Right Honourable," is frequently given as an honorary reward for important political services: but no privy councillor attends a meeting of the Council unless specially summoned; and "with the exception of such of them as are called 'cabinet ministers,' the privy councillors are not now ordinarily summoned to advise the King." (Stephen, Com., 16th ed. 1914, ii. 576.) The right to attend without summons was, however, asserted by the Dukes of Argyle and Somerset on the memorable occasion of Queen Anne's last Council in 1714, when they suddenly appeared unbidden at the Council board, and disconcerted the plans of the Jacobites. (See Lord Mahon, Hist. of Eng., i. 91.)

(*o*) In 1711 the Earl of Scarsdale, in the House of Lords, having proposed a resolution in which the responsible advisers of the crown were referred to as the "cabinet council," afterwards substituted the word "ministers" as being "better known." This alteration gave rise to a discussion, in the course of which some peers maintained that "ministers" and "cabinet council" were synonymous, others that there might be a difference. The Duke of Argyle thought "all ministers were of the cabinet council, but that all the cabinet council were not ministers"; Lord Ferrers, that "the word ministry is more copious than cabinet council." Lord Cowper maintained that they were both terms of an uncertain signification, and "cabinet council" a word "unknown in our law"; while the Earl of Peterborough observed that "he had heard a distinction between the cabinet council and the Privy Council; that the privy councillors were such as were thought to know everything, and knew nothing, and those of the cabinet council thought nobody knew anything but themselves." Cobbett's Parl. Hist., vi. 971.

political parties which have contended one against the other for the control of the executive power. The origin of the whigs and tories, and their essential points of difference, have been already considered (*p*). It was not, however, until the accession of George I. that government by party was fully established. The whigs, who had secured the crown to William III., expected that he would choose his ministers solely from their ranks. But the king was strongly opposed to government by party. He wished to retain the chief directing power himself, and to secure the support of a united parliament in carrying out his continental policy of opposition to Louis XIV. of France. Accordingly, down to the year 1693, he distributed the chief offices in the government about equally between the two parties. But this policy, while it maintained the chief efficient power in the hands of the king, not only failed to secure unanimity among the various ministers of the crown, but even allowed of open hostility between them, as well in the discharge of their executive duties as in the discussions in parliament. The inconvenience of this state of things was so great that at length, between 1693 and 1696, acting on the advice of Robert, Earl of Sunderland, William abandoned the neutral position which he had hitherto maintained between the two parties, and entrusted all the chief administrative offices to the whigs, who commanded a majority in the House of Commons. The close union of the whig leaders, each promptly defending his colleagues against every attack, was so novel a spectacle that they became popularly known as "the Junto." But the ministerial system of government in its modern form was by no means as yet completely established. When, at the general election of 1698, a House of Commons was returned adverse to the Junto, and Montagu, who, as first lord of the treasury, had for four years occupied the position and wielded the power of leader of the House, ceased to exercise any control over it, the ministry instead of resigning office to their adversaries, as statesmen similarly situated would now act, kept their places. Thus the old want of harmony between the servants of the

"The Junto."

(*p*) *Supra*, pp. 608-610.

crown and the representatives of the people returned in full force, and continued, with some short intervals of composedness, until the general election of 1705 again sent up a whig majority to parliament (*q*).

Attempted revival of ancient authority of Privy Council.

It was during this interval of disunion between the cabinet and the majority in parliament, and while the possibility of still greater divergence, on the accession of a foreign dynasty, was present in men's minds, that an attempt was made at once to check the personal action of the king and to secure the responsibility of his ministers by the provisions of the 4th clause of the Act of Settlement. That clause provided, as we have seen, that after the accession of the House of Hanover, all matters relating to the government of the kingdom which were cognisable in the Privy Council, should be transacted there, and be authenticated by the signatures of such privy councillors as should advise and consent to the same. It was, however, soon perceived that this revival of the ancient authority of the Privy Council was an anachronism, and the clause was repealed, as already mentioned, early in Queen Anne's reign, before it could come into operation.

Queen Anne's dislike of party government.

Queen Anne, equally with William III., displayed a strong and persistent preference for a mixed ministry, composed of the moderate men of each party. Her first ministry, throughout almost its whole existence, was of this character, and the complete predominance of the whig element which finally ensued was very distasteful to the queen. On the fall of Godolphin's administration in 1710, both she and Harley were anxious to avoid a ministry entirely tory, and vainly endeavoured to induce the whig leaders to join in forming a coalition ministry, but with a preponderance of power in the hands of the tories (*r*). The general election of that year, which was greatly influenced by the exertions of the clergy, who had been roused to opposition by the trial of Sacheverell, produced such a crushing defeat of the whigs, that the tory ministry under Harley, now made Earl of Oxford, retained undisputed sway until the close of the queen's reign (1714).

(*q*) Macaulay, Hist. Eng. (1861), ch. xxiv., v. 165.
(*r*) Lecky, Hist. of Eng., i. 225.

Final establishment of the cabinet system under the first two Georges.

It was, however, under the first two kings of the House of Hanover, the accession of whose dynasty was to have marked the extinction of the cabinet system, that parliamentary government by means of a ministry—nominally the king's servants, but really an executive committee representing the will of the party majority for the time being in the House of Commons—was fully and finally established. This was due, in a great measure, to the personal character of George I. and George II., who, aliens in blood, in language, and in political sympathies, clung fondly to their beloved Hanover, and seemed to regard the kingship of Great Britain as an appendage, and rather an irksome appendage, to their small German Electorate.

"The troublesome energies of parliament," observes Sir Erskine May, "were an enigma to them; and they cheerfully acquiesced in the ascendancy of able ministers who had suppressed and crushed pretenders to their crown—who had triumphed over parliamentary opposition, and had borne all the burthen of the government. Left to the indulgence of their own personal tastes—occupied by frequent visits to the land of their birth, by a German court, favourites and mistresses—they were not anxious to engage more than was necessary in the turbulent contests of a constitutional government. Having lent their name and authority to competent ministers, they acted upon their advice, and aided them by all the means at the disposal of the court" (*s*).

Important effects of their indifference to English politics.

This indifference of the first two Georges to everything not affecting the interests of their continental dominions had most important and beneficial effects. It allowed the English constitution to develop freely under a kingship from which the element of personal royal power was for the time practically eliminated. George III., who "gloried in the name of Briton" without understanding in what it is that the glory of a Briton consists, strove hard throughout his reign to recover the ground lost under his two immediate predecessors; but the system of ministerial government with collective responsibility to the House of Commons was too firmly established to be overthrown, and is now regarded, though still unrecognised in the

(*s*) May, Const. Hist., i. 7.

written constitution, as a part of our polity almost as essential as the parliament itself.

The ministerial system.

No conception of the English constitution, in its existing theory and practice, can have any approach to accuracy which does not include a firm grasp of the complicated and delicate nature of the cabinet system—that unique production of the silent working of the political forces of the nation towards the equilibrium in which, by means of that system, they now repose. Lord Macaulay was the first among our great historians to expound its true nature. "The ministry," he tells us, "is, in fact, a committee of leading members of the two Houses. It is nominated by the crown; but it consists exclusively of statesmen whose opinions on the passing questions of the time agree, in the main, with the opinions of the majority of the House of Commons. Among the members of this committee are distributed the great departments of the administration. Each minister conducts the ordinary business of his own office without reference to his colleagues. But the most important business of every office, and especially such business as is likely to be subject of discussion in parliament, is brought under the consideration of the whole ministry. In parliament the ministers are bound to act as one man on all questions relating to the executive government. If one of them dissents from the rest on a question too important to admit of compromise, it is his duty to retire. While the ministers retain the confidence of the parliamentary majority, that majority supports them against opposition, and rejects every motion which reflects on them or is likely to embarrass them. If they forfeit that confidence, if the parliamentary majority is dissatisfied with the way in which patronage is distributed, with the way in which the prerogative of mercy is used, with the conduct of foreign affairs, with the conduct of a war, the remedy is simple. . . . They have merely to declare that they have ceased to trust the ministry, and to ask for a ministry which they can trust" (*t*).

(*t*) Macaulay, Hist. Eng., ch. xx. [1861, iv. 437], 1866, iv. 44; and see Bagehot, English Constitution, for a spirited and able sketch of the convention or unwritten constitution as contrasted both with the written or legal

"Ministry" and "cabinet" not synonymous.

The expressions "the ministry" and "the cabinet" are sometimes employed as though they were synonymous; but such a use of them is misleading. The term "ministry" properly includes all the ministers, yet of these only a select number—usually about twelve (*u*), but liable to variation from time to time even in the same administration—constitute the inner council of the crown, and incur the higher responsibilities, while they exercise the higher powers of government. The rest of the ministry, although closely united with their brethren in the cabinet, occupy a secondary and subordinate position.

Cabinet council distinct from Privy Council.

Although, as we have seen, historically connected in its origin with the Privy Council, the cabinet council has now no connection with that body, except that every member of it, if not already a privy councillor, is made one immediately on joining the cabinet. But an essential characteristic of the cabinet is that its members should combine in their persons the office of minister of the crown with that of membership of one of the Houses of Parliament, and more especially of that House which though still conventionally termed the "Lower House" is admittedly the "greatest of the powers of the state." The necessity for this rule has not, however, been unquestioned. "A cabinet which included persons not members of the legislative assembly might still," says an eminent writer on the constitution, "perform all useful duties" (*w*). But independently of the practical inconveniences which, as he admitted, would beset the work of government by a cabinet so constituted, it would no longer be, what it now is, "a committee of the two Houses," and would thus be disabled from performing its essential work as the regulator of the relations between the crown, the House of Lords, and the commons, and the means by which their theoretically conflicting powers are brought into practical

Ministers to be members of the legislature.

constitution and with the presidential form of government in the United States of America.

(*u*) [In recent administrations the members of the cabinet have numbered twenty and even more; but the principal secretaries amount now, as before, to twelve only. In Mr. Asquith's late administration, the Attorney-General was included in the cabinet, thus making twenty-two members.—Ed.]

(*w*) Bagehot, Eng. Const., p. 13.

harmony (*x*). But although the rule which requires the minister to be a member of the legislature is now firmly established, so that any deliberate and persistent departure from it would be justly regarded as utterly unconstitutional, yet there is no law or legal usage to render it binding; and it has at least once within the last half-century been disregarded, though then only temporarily and in an individual case (*y*).

It is remarkable that a body wielding such vast powers as the cabinet should hold all its deliberations and adopt all its decisions in absolute secrecy. No official record, or minute of any kind, is kept of its proceedings; and even a private note is disliked. Nor is any non-member even allowed to be present at its sittings, except on the rare occasions when some departmental official is summoned to impart special information. This peculiarity has been animadverted upon by Hallam as "an apparent deficiency in our constitutional security," on acount of the difficulty of legally proving the participation of any one member (except the lord chancellor, who is responsible for setting the great seal to treaties and other documents) in any measures deserving of impeachment (*z*). It is indeed one of the many theoretical anomalies of the English constitution, the delicate mechanism of which depends so largely for its

Secrecy of the cabinet.

(*x*) Bagehot, Eng. Const., p. 14, defined the cabinet as "a combining committee—a *hyphen* which joins a *buckle* which fastens the legislative part of the state to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other." But the cabinet, he adds (p. 15), "though it is a committee of the legislative assembly, is a committee with a power which no assembly would—unless for historical accidents, and after happy experience—have been persuaded to entrust to any committee. It is a committee which can dissolve the assembly which appointed it: it is a committee with a suspensive veto—a committee with a power of appeal. Though appointed by one parliament, it can appeal if it chooses to the next. Theoretically, indeed, the power to dissolve parliament is entrusted to the sovereign only; and there are vestiges of doubt whether in *all* cases a sovereign is bound to dissolve parliament when the cabinet asks him to do so. But neglecting such small and dubious exceptions, the cabinet which was chosen by one House of Commons has an appeal to the next House of Commons."

(*y*) Mr. Gladstone was a secretary of state between December 1845, and July 1846, without, from accidental circumstances, possessing a seat in the House of Commons. But the occurrence excited some animadversion at the time.—Gleanings of Past Years, i. 225.

(*z*) Const. Hist., iii. 185.

efficient working upon the loyalty of the various depositories of power. Should, however, this specific anomaly ever, unhappily, prove a practical difficulty, the vitality of the constitution will doubtless be equal to devising a practical remedy.

The prime minister.

The chief of the cabinet is the prime minister, or, as he is commonly termed, the premier. His position was, formerly, not less peculiar or characteristic than that of the cabinet itself. Officially, besides being a privy councillor, he was merely the first lord of the treasury (*a*), in which capacity he exercised, jointly with four others, the powers of the lord high treasurership, one of the great offices of state which since the time of Harley has been thrown into commission. He had formerly no legal primacy over the other members of the cabinet, as is indeed necessarily the case in a body which has itself no legal status. In official precedence he ranked below many of the other ministers. [The *office* of prime minister was not known to the law until 1905, when by royal warrant of December 2, the holder of the office was given precedence next after the Archbishop of York, and his office was formally recognised. The only earlier official use of the designation was in the Treaty of Berlin, 1878, when Lord Beaconsfield was described as "prime minister."] (*b*) He is selected by the sovereign, whose choice among natural-born subjects is legally unrestrained (*c*); but in fact the choice of the sovereign is limited to the one or two members of the predominant political party who can command a

(*a*) [Since this work was written, the "position" of prime minister was attached on three occasions to the office of secretary for foreign affairs (viz., in Lord Salisbury's first administration, 1885-1886; his second, 1886-1892; and in his third and last). This arrangement called forth some remonstrance from Mr. Gladstone, the leader of the opposition, solely on the ground that such an arrangement would not tend to the despatch of public business. It was never hinted that it was unconstitutional; nor indeed, considering the non-official character of the cabinet, could a constitutional question arise upon the point. It resolves itself simply into a matter of convenience, and there is no reason whatever why the president of the cabinet (or prime minister) should not hold any one other of the portfolio offices. As being a new departure from the customary habit, it necessarily aroused comment. The text of the author must accordingly be read with this modification.—Ed.]

(*b*) [*Cf.* Encyc. Brit. 11th ed. sub. "Prime Minister"; Anson, Law and Custom of the Constitution, vol. ii., pt. i. (1907, p. 127).—Ed.]

(*c*) [See Parl. Debates, 3rd series, vol. 83, p. 1004, *per* Sir R. Peel.]

majority in the House of Commons. When charged by the sovereign with the task of forming an administration he proceeds to the selection of occupants for the various ministerial offices, and submits their names for the approval of the crown.

Relations of the cabinet to the crown and to parliament.

The delicate relations of the cabinet (*cc*) to the crown on the one hand, and to the Houses of Parliament and the people on the other, as well as the internal relations of its members to one another and to the premier, have not yet been touched upon. They are indeed topics upon which none but a cabinet minister is fully competent to speak. Fortunately, we now possess an account of them, at once graphic and authentic, from the pen of a most distinguished modern premier. "The association," says Mr. Gladstone, "of the ministers with the parliament, and through the House of Commons with the people, is the counterpart of their association as ministers with the crown and the prerogative. The decisions that they take are taken under the competing pressure of a bias this way and a bias that way, and strictly represent what is termed in mechanics the composition of forces. Upon them, thus placed, it devolves to provide that the Houses of Parliament shall loyally counsel and serve the crown, and that the crown shall act strictly in accordance with its obligations to the nation. . . . In the face of the country the sovereign and the ministers are an absolute unity. The one may concede to the other: but the limit of concession by the sovereign is at the point where he becomes willing to try the experiment of changing his government; and the limit of concession by the ministers is at the point where they become unwilling to bear, what in all circumstances they must bear while ministers, the undivided responsibility of all that is done in the crown's name. But it is not with the sovereign only that the ministry must be welded into identity. It has a relation to sustain to the House of Lords; which need not, however, be one of entire unity, for the House of Lords, though a great power in the state, and able to cause great embarrassment to an administration, is not able by a vote to doom it to capital punishment.

(*cc*) [This portion of the text and the next two pages formed a footnote in the previous edition.]

Only for fifteen years out of the last fifty [1878] has the ministry of the day possessed the confidence of the House of Lords. On the confidence of the House of Commons it is immediately and vitally dependent. This confidence it must always possess, either absolutely from identity of political colour, or relatively and conditionally."

Three-fold capacity of cabinet minister.

Of the members of the cabinet, Mr. Gladstone proceeds: "Every one of them acts in no less than three capacities: as administrator of a department of state; as member of a legislative chamber; and as a confidential adviser of the crown. Two at least of them add to these three characters a fourth; for in each House of Parliament it is indispensable that one of the principal ministers should be what is termed its leader. This is an office the most indefinite of all, but not the least important. With very little of defined prerogative, the leader suggests, and in a great degree fixes, the course of all principal matters of business, supervises and keeps in harmony the action of his colleagues, takes the initiative in matters of ceremonial procedure, and advises the House in every difficulty as it arises.

Internal relations of the cabinet.

"The nicest of all the adjustments involved in the working of the British government is that which determines, without formally defining, the internal relations of the cabinet. On the one hand, while each minister is an adviser of the crown, the cabinet is an unity, and none of its members can advise as an individual, without, or in opposition actual or presumed to, his colleagues. On the other hand, the business of the state is a hundredfold too great in volume to allow of the actual passing of the whole under the view of the collected ministry. It is therefore a prime office of discretion for each minister to settle what are the departmental acts in which he can presume the concurrence of his colleagues, and in what more delicate, or weighty, or peculiar cases, he must positively ascertain it. So much for the relation of each minister to the cabinet; but here we touch the point which involves another relation, perhaps the least known of all, his relation to its head.

"The head of the British government is not a grand vizier. He has no powers, properly so called, over his

colleagues: on the rare occasions when a cabinet determines its course by the votes of its members, his vote counts only as one of theirs. But they are appointed and dismissed by the sovereign on his advice. In a perfectly organised administration, such for example as was that of Sir Robert Peel in 1841-1846, nothing of great importance is matured, or would even be projected, in any department without his personal cognisance: and any weighty business would commonly go to him before being submitted to the cabinet. He reports to the sovereign its proceedings, and he also has many audiences of the august occupant of the throne. He is bound, in these reports and audiences, not to counterwork the cabinet: not to divide it; not to undermine the position of any of his colleagues in the royal favour. . . . As the cabinet stands between the sovereign and the parliament, and is bound to be loyal to both, so he stands between his colleagues and the sovereign, and is bound to be loyal to both.

"As a rule, the resignation of the first minister, as if removing the bond of cohesion in the cabinet, has the effect of dissolving it. A conspicuous instance of this was furnished by Sir Robert Peel in 1846; when the dissolution of the administration, after it had carried the repeal of the Corn Laws, was understood to be due not so much to a united deliberation and decision as to his initiative. The resignation of any other minister only creates a vacancy. In certain circumstances, the balance of forces may be so delicate and susceptible that a single resignation will break up the government; but what is the rule in the one case is the rare exception in the other. The prime minister has no title to override any one of his colleagues in any one of the departments. So far as he governs them, unless it is done by trick, which is not to be supposed, he governs them by influence only. But upon the whole, nowhere in the wide world does so great a substance cast so small a shadow; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative" (*d*).

(*d*) "Kin beyond Sea," pub. in *North American Review*, Sept. 1878, repub. in Gleanings of Past Years, i. 225, 226, 235, 241, 242-244.

Increased security of crown and ministers under the cabinet system.

Not the least of the many advantages which have accrued from the establishment of the cabinet form of parliamentary government has been the increased security of the crown and of its ministers. The old constitutional maxim that "the king can do no wrong" is now literally true, for his acts are really the acts of his ministers; and his ministers are responsible to the House of Commons not merely as of old, for any breach of the law, but for the general course of their policy, which must accord with the opinions of the majority of that House, or else, in conformity with a constitutional usage practically as binding as a legal enactment, the ministers are bound to resign office. Instead of a revolution or a parliamentary impeachment, a change of ministry suffices to preserve harmony between the crown and the people.

Exclusion of placemen and pensioners from the House of Commons.

The sixth clause of the Act of Settlement, by which all placemen and pensioners were excluded from parliament, was directly aimed, not at the cabinet system, but at the dangerous influence which the crown had acquired through the profuse distribution of offices and pensions among the members of the legislature. This means of corrupting the representatives of the people had been extensively employed under the last two Stuarts; and William III., amidst the difficulties with which he found himself surrounded, adopted and even extended this baneful expedient for controlling his parliaments. To check this abuse the commons, in 1693, passed a bill to prohibit all members thereafter elected from accepting any office under the crown. Rejected by a small majority of the lords, the bill was re-introduced in the following year and passed both Houses; but William III. refused the royal assent. A few years later, however, the principle of disqualification received a legislative sanction by the express exclusion from the House of Commons of the newly appointed commissioners of stamps and excise (*e*). The total exclusion of all servants of the crown from the House of Commons enacted by the Act of Settlement, was not only far too drastic a remedy for the special evil which it was intended to meet, but would also,

(*e*) 4 & 5 Will. & Mary, c. 21 (Stamps); 11 & 12 Will. III. c. 2, s, 50 (Excise).

if carried into practice, have brought the ministers of the crown into hopeless conflict with the House of Commons, and, by preventing the fusion of the legislative and executive powers, have effectually stopped the development of the system of parliamentary or cabinet government which we now enjoy. The clause was, however, as we have seen, repealed before it could come into operation, in the fourth year of Queen Anne's reign (*f*); and two years afterwards, by the "Act for the security of the crown and succession" (*g*), more reasonable provisions were enacted for the prevention of corrupt influence. (1) Every person holding "any office or place of profit whatsoever under the crown" created since October 25, 1705, or in receipt of a pension during the pleasure of the crown, was incapacitated from sitting in the House of Commons; and (2) every member of that House accepting any of the previously existing offices under the crown (except a higher commission in the army) was obliged to vacate his seat, though still eligible for re-election (*h*). So long as the system of ministerial government, with responsibility to the House of Commons, was not fully established, and while the House of Commons itself remained liable to corrupt influences, and, under a restricted franchise, failed to represent the people, such a provision as the latter, which compelled the acceptance of office by a representative to be submitted to the approval of his constituents, acted as a salutary check both upon the crown and the leading members of the commons. But now, with a reformed suffrage, and under a customary or unwritten constitution in which one of the principal functions of the members of the commons is, by an indirect process, to choose the ministers of the crown, the reasons for the enactment have ceased to exist. Although, however, several attempts have been made to modify the principle, they have been always unsuccessful, with the single exception contained in the Reform Act of 1867, dispensing with the requirement of 6 Anne, c. 7, in the

(*f*) 4 Anne, c. 8, s. 25.
(*g*) 6 Anne, c. 7.
(*h*) 6 Anne, c. 7. To check the increase of placemen, certain restrictions were also imposed on the multiplication of commissioners.

case of the removal of a minister from one office under the crown to another (*i*).

The exception from the Act of 6 Anne, c. 7, of all offices existing on October 25, 1705, enabled the crown still to exercise extensive corruption by means of places, and in 1741 no less than two hundred appointments were held by members of the House of Commons (*k*). In the following year, however, the Place Bill (*l*), which had been thrice rejected by the commons and twice by the lords, passed into an Act, excluding from the House a large number of officials, chiefly clerks and other subordinate officers of the public departments. In 1782 several other offices which had been generally held by members of parliament were suppressed by Lord Rockingham's Civil List Act (*m*); and the policy of official disfranchisement has been since almost invariably followed whenever new officers have been appointed by Acts of Parliament.

The "Place Bill" of 1742.

Secret pensions.

The incapacity imposed by the Act 6 Anne, c. 7, upon pensioners of the crown during pleasure, though extended at the commencement of the next reign to pensioners for terms of years (*n*), was eluded by the grant of secret pensions out of the large sum annually voted to the crown "as secret service money," and expended without any account; but by Lord Rockingham's Act already referred to, the power of granting pensions out of the king's civil list was considerably limited, and secret pensions were abolished by a provision that in future all pensions should be paid at the public exchequer. In the same year a stop was put to another form of parliamentary corruption by an Act disqualifying contractors for the public service from sitting in the House (*o*).

(*i*) 30 & 31 Vict. c. 102, s. 52. [Under the Reelection of Ministers Act, 1919, a member of parliament need not vacate his seat by reason of accepting an office of profit, if such acceptance takes place within nine months after the issue of a proclamation summoning a new parliament.] (*k*) Lords' Protests, 1741.
(*l*) 15 Geo. II. c. 22. (*m*) 22 Geo. III. c. 82. (*n*) 1 Geo. I. c. 56.
(*o*) 22 Geo. III. c. 45. The Irish Parliament, in 1793, applied the principle of the English Act of Anne to its own members by disqualifying all holders of offices under the crown or lord lieutenant created after that time. This disqualification was extended, at the union, to the parliament of the United Kingdom; and at the same time several new disqualifications in respect of Irish offices were added (41 Geo. III. c. 52).

In the first parliament of Geo. I. there were 271 members holding offices,

Exclusion of judges from House of Commons.

The common law judges had always been disqualified from sitting in the House of Commons; and this exclusion was extended to the Scottish judges under George II., and to the Irish judges under George IV. The same rule was applied in 1840 to the judge of the Court of Admiralty; and the holders of all newly-created judicial posts have been disqualified by the Acts under which they were constituted. The master of the rolls -hitherto the sole judge who had retained the capacity of sitting in the commons - has been also at length disqualified by the clause of the Supreme Court of Judicature Act, 1873, which declares that no judge of the High Court of Justice or of the Court of Appeal shall be capable of being elected to or of sitting in that House (*p*).

ALIENS.

[The fifth clause of the constitutional provisions of the Act of Settlement imposing various disabilities on aliens (*pp*) was] repealed by 7 & 8 Vict. c. 66 (Mr. Hutt's Naturalisation Act) *as to such parts* as are inconsistent with the provisions of that Act (viz., secs. 3, 5, 6, and 16). The statute 7 & 8 Vict. c. 66 is itself repealed by 33 & 34 Vict. c. 14 (the Naturalisation Act, 1870), by sec. 7 of which last Act the above clause of the Act of Settlement is *virtually* repealed as to all persons obtaining a certificate of naturalisation. This 5th clause of the constitutional provisions of the Act of Settlement was founded, like the 2nd and 3rd, on a very reasonable jealousy of a foreign king and foreign favourites. It was confirmed by statute 1 Geo. I. st. 2, c. 4, which, "for the better preserving the said clause in the said Act entire and inviolate," provided

pensions, and sinecures. In the first parliament of George II., 257; in the first parliament of George IV., but 89, exclusive of officers in the army and navy; and in 1833 there were only 60 members holding civil offices and pensions, and 83 holding naval and military commissions. On places and pensions in the House of Commons, see May, Const. Hist., i. pp. 369-375.

(*p*) 36 & 37 Vict. c. 66, s. 9.

["With the Reformation, the Revolution, the Restoration, and the expulsion of the Stuarts, the limits of the executive power in England were defined, and the political Constitution formally established."—Gneist, Hist. Eng. Const., who refers among general and political histories to the following, viz., Hallam, Const. Hist. of England; Lord Mahon, Hist. from the Peace of Utrecht; and W. Massey, Hist. of Engl. under George III.—ED.]

(*pp*) [The text dealing with this subject was in a footnote in the preceding edition.—ED.]

that no bill for the naturalisation of any person should be received without a clause disqualifying him from sitting in parliament or enjoying the prohibited offices or places of trust. Jealousy of aliens was at this time specially strong in consequence of the conduct of William III. in appointing foreigners who accompanied him from Holland to high positions in the English state, but the feeling had always existed more or less.

Their disabilities by common law.

Magna Carta.

By the common law aliens were incapacitated from holding land or any public office, and even from exercising any civil rights. Magna Carta granted certain privileges to foreign merchants (*q*), but all aliens dwelling in England long remained subject to higher taxation and to many vexatious restrictions, more particularly as to retail trade. By stat. 32 Hen. VIII. c. 16, they were further prohibited from taking any shop or dwelling-house on lease, and they were at all times liable to be ordered by the crown to quit the realm. The last occasion on which this right of expulsion was exercised occurred in 1575 under Elizabeth.

Denization and naturalisation.

An alien might become, to a certain extent, an English subject, either by *denization* under the king's letters patent, or by *naturalisation* by Act of Parliament, the latter mode not merely enabling him to hold land, but to inherit it from others and to transmit it by inheritance to his children, whether born before or after his naturalisation. By stat. 7 Jac. I. c. 2, it was, however, enacted that no person should be naturalised unless he should first take the oaths of allegiance and supremacy in the presence of the parliament and also take the sacrament. But as it was impossible to limit the action of future parliaments, these provisions, as well as those of the 1 Geo. I. st. 2, c. 4, for insuring the observance of the 5th clause of the Act of Settlement, were occasionally dispensed with by special Acts of Parliament passed previously to the introduction of bills for the naturalisation of particular individuals. In 1708 one general Act was passed (7 Anne, c. 5) for the naturalisation of all foreign protestants, but this was repealed three years afterwards. In 1753, the famous Jew

The "Jew Bill," 1753.

(*q*) *Supra*, p. 118.

Bill was passed (26 Geo. II. c. 26) enabling foreign Jews to be naturalised without taking the sacrament as required by the 7 Jac. I. c. 2; but the popular dislike excited by this measure was so great that it was repealed in the following session of parliament. At length, in 1825, by Geo. IV. c. 67, the preliminary sacramental test imposed by the 7 Jac. I. c. 2 was abolished in all cases; and in 1844 the provision of 1 Geo. I. st. 2, c. 4, as to naturalisation bills was also repealed by 7 & 8 Vict. c. 66, s. 2.

While in the interest, or supposed interest, of the English people, aliens were subjected to certain disabilities, and even to liability to expulsion when the safety of the state should require it, their right of asylum (*r*) against foreign governments was ever maintained inviolate. But in 1793 the suspicion that some of the political refugees who came over in great numbers at the time of the French Revolution were in league with democratic associations in England in conspiracies against the government, led to the passing of an Alien Act (33 Geo. III. c. 4) placing all foreigners under strict surveillance, and empowering the secretary of state to remove any who were suspected out of the realm. The Alien Act, which was passed for one year only, was renewed from time to time, but its more stringent provisions were relaxed as soon as peace was temporarily restored in 1802. In that year the arrogant demand of Napoleon, First Consul of the French Republic, that we should "remove out of the British dominions all the French princes and their adherents, together with the bishops and other individuals whose political principles and conduct must necessarily occasion great jealousy to the French Government," was firmly refused, except in the single instance of M. Georges, who, having been concerned in circulating papers hostile to the government in France, was removed from our European dominions. On the resumption of the war the Alien Act was again renewed in its integrity; after the peace of 1814, its provisions were again relaxed; and from 1816 its re-enactment, even in a modified form, was strongly opposed in parliament, until its final abandonment in 1826.

Alien Act, 1793.

(*r*) See *infra*, p. 680.

Registration of aliens, 1836.

The registration of aliens was still, however, insisted on, and fresh provisions for this purpose were enacted in 1836 by the 6 & 7 Will. IV. c. 11; but their execution has gradually fallen into disuse. During the political disturbances of 1848 the English executive were empowered by parliament (11 & 12 Vict. c. 20), for the space of one year, to remove from the kingdom any foreigners who should be considered dangerous to its peace, but this power was never exercised.

Mr. Hutt's Naturalisation Act, 1844.

In the meantime, in 1844, the naturalisation of aliens had been greatly facilitated by Mr. Hutt's Act, 7 & 8 Vict. c. 66, which enabled them, on obtaining a certificate from the home secretary, and taking the oath of allegiance, to acquire all the rights and capacities of natural-born British subjects, except the capacity of becoming a member of either House of Parliament, or of the Privy Council, or any other rights and capacities specially excepted in the certificate. This Act has since been repealed by the Naturalisation Act of 1870 (33 & 34 Vict. c. 14, amended by 35 & 36 Vict. c. 39), which has completely altered the status of aliens and naturalised subjects, upsetting the ancient maxim, "nemo patriam in qua natus est exuere, aut ligeantiae debitum ejurare, potest," and rendering much of the learning as to allegiance and aliens contained in the famous *Calvin's case* (*s*) and in subsequent cases, now only historically interesting. Under the existing law an alien may take, acquire, hold, and dispose of real and personal property in the United Kingdom, of every description (except British ships) in the same manner in all respects as a natural-born British subject, but without the right to any office or franchise, municipal, parliamentary, or other; and on obtaining a certificate of naturalisation from one of His Majesty's principal secretaries of state, he becomes entitled, in the United Kingdom, to all *political* and other rights and privileges, and subject to all the obligations, of a natural-born subject. It is also provided that a natural-born subject may become a "statutory alien" by being voluntarily naturalised in a foreign state, and may again acquire British nationality by permission of a secretary

Naturalisation Act, 1870.

(*s*) *Supra*, p. 482.

of state. [The Act of 1870 is repealed by the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 17), which consolidates and amends the law on the subject.]

[In the case of *Rex* v. *Lynch* (1903) (*t*) it was held that the Naturalisation Act, 1870 (33 & 34 Vict. c. 14), does not permit naturalisation in a foreign state at war with Great Britain; that a British subject who renounces his allegiance and attempts to procure himself to be naturalised in an enemy's country in time of war is guilty of high treason, and that the Statute of Treasons (25 Edw. III. st. 5, c. 2) applies to acts committed *within or without* Great Britain. This case laid it down that a British subject cannot become naturalised in an enemy's state in time of war; and that the act of becoming naturalised under such circumstances is itself an act of treason and ineffectual to afford protection in an indictment for treason in subsequently joining the enemy's forces.

Alien Immigration Act, 1905.

By the Alien Immigration Act, 1905 (5 Edw. VII. c. 13), a check has been placed upon the influx of pauper and undesirable foreigners into England, without, however, restricting the privilege of asylum to such political refugees as are not dangerous to the peace of the realm. This Act classifies certain aliens as "undesirables"—namely, (a) such as, not being political or religious refugees, cannot prove that they are able to support either themselves or those dependent on them; (b) lunatic or idiot aliens, or such as, suffering from a disease or some infirmity, may become a burden upon the community; (c) such as have been sentenced for an extraditable offence in a foreign country; and (d) such as in whose case an expulsion order has been made.

At present, these regulations are mainly enforced, at the instance of the home secretary, against such undesirable aliens as are conveyed in numbers of and exceeding twenty, being steerage passengers, to the shores of England. These can only be landed at certain ports, where they are examined by the immigration officer, who, subject to appeal to an immigration board, has the right to refuse admission to any who appear to him to be "undesirable." The Act,

(*t*) *Supra*, p. 383.

again, provides for the expulsion of aliens who, after arrival in the country, have been found guilty of crimes and misdemeanours, or who are required for an extraditable offence against the laws of a foreign country, or who are destitute.

An outburst of lawlessness among the alien population in the East End of London, in 1911, when aliens shot down the police while in the execution of their duty, aroused a storm of indignation against the laxity with which the alien in England is kept under surveillance, and may possibly lead to a more rigorous application of the law as it stands. The sharpest weapon in the hands of the Government—that of registration, or a modified form of the passport system, which, provided by the Registration of Aliens Act (6 & 7 Will. IV. c. 11), has been allowed to fall into abeyance—would presumably suffice to combat the evil. But so jealous is the British public supposed to be of "the liberty of the subject," and so chary of imposing restrictive measures that would perhaps savour of continental police coercion, that fresh legislation, although promised by the government, will, as far as can be presently foreseen, not go beyond the framework of the Act of 1905 (*tt*).

Asylum.

In international law, the right which resides in a state of permitting fugitives from any other country to enter into or dwell within its territory is called *asylum*; while extradition treaties ratified between states for their mutual protection and advantage circumscribe the exercise of this privilege of asylum in the case of fugitives from justice. In this regard, the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), modifies the provisions of the Habeas Corpus Act (31 Car. II. s. 15) (*u*).]

(*tt*) [The registration of friendly aliens was enforced during the Great War, and the practice is being continued and systematised after the conclusion of the definitive treaty of peace, June 28, 1919.—Ed.]

(*u*) [On this subject, which essentially belongs to the province of International Law, *see* Laws of England (Earl of Halsbury) and The Encyc. of the Laws of England, sub. "Extradition."—Ed.]

CHAPTER XVII.

PROGRESS OF THE CONSTITUTION SINCE THE REVOLUTION (CONTINUED).

In the preceding chapter we have discussed the Act of Settlement and the various topics arising out of its provisions, including that most important topic of all—the growth and present working of the cabinet system. Much more remains to be said on the progress of the constitution since the Revolution: and with a view as well to clearness of exposition as to conciseness of statement the chief remaining constitutional facts may be conveniently grouped under the five heads of (1) the kingship, (2) the House of Lords, (3) the House of Commons, (4) religious liberty, and (5) the liberty of the press.

I. *Kingship since the Revolution.*

Legal prerogatives of the crown.

The legal prerogatives of the crown were untouched by the Revolution settlement. It was only the recent innovations which were swept away, leaving to the kingship the legal character which it had possessed prior to the usurpations of the Tudors and Stuarts. By the written constitution the king still retains the supreme executive and coordinate legislative power. He calls parliament together, prorogues or dissolves it at pleasure, and may refuse the royal assent to any bills. He is the "fountain of justice," and as such dispenses royal justice through judges appointed to preside, in his name, over the various courts of judicature. As supreme magistrate and conservator of the peace he nominally prosecutes criminals, and may pardon them after conviction. As supreme military commander, he has the sole power of raising, regulating,

and disbanding armies and fleets. As the "fountain of honour," he alone can create peers (a power of the highest constitutional importance) and confer titles, dignities, and offices of all kinds. He is the legal head and supreme governor of the national church, and in that capacity convenes, prorogues, regulates, and dissolves all ecclesiastical synods or convocations (*a*). As the representative of the majesty of the state in its relations with foreign powers, he has the sole power of sending and receiving ambassadors, of contracting treaties and alliances, and of making war and peace (*b*).

But in practice these vast prerogatives have now long been exercised not at the will of the sovereign, but of the responsible ministers of the crown, who represent the will of the majority in the House of Commons. "In outer seeming," it has been well observed, "the Revolution of 1688 had only transferred the sovereignty over England from James to William and Mary. In actual fact, it was transferring the sovereignty from the king to the House of Commons. From the moment when its sole right to tax the nation was established by the Bill of Rights, and when its own resolve settled the practice of granting none but annual supplies to the crown, the House of Commons became the supreme power in the state. It was impossible permanently to suspend its sittings, or, in the long run, to oppose its will, when either course must end in leaving the government penniless, in breaking up the army and navy, and in rendering the public service impossible" (*c*).

Personal influence of the sovereign.

The mode in which the executive power of the crown has gradually been transferred to what has been aptly termed "a board of control chosen by the legislature to rule the nation" (*d*), has been already sketched in treating of the

(*a*) See *infra*, pp. 751 *seq.*

(*b*) See Stephen, Comm., 5th ed., ii. 473-547.

(*c*) J. R. Green, Short History of the English People, p. 680. [To the same effect, Gneist, Hist. Eng. Const., p. 683, who remarks: "To the king in parliament, therefore, all those powers are transferred which have been lost by the king in council; that is to say, the ministers of the crown, for the time being, now need the consent of parliament to a long series of cases which were in former times discharged, as a matter of course, in the Council." *Cf. ibid.* note to p. 684; and Taylor, Engl. Const. p. 606.—Ed.]

(*d*) Bagehot, Eng. Const., p. 13.

growth of the cabinet. But though greatly weakened at the Revolution, the personal influence of the sovereign over the administration of affairs long continued to be openly exercised, and is still potent, to an extent which can be known only to the parties themselves, in the confidential intercourse of ministers with the head of the state (*e*).

Causes which tended to induce its decline.

Several general causes tended to bring about a decline in the personal influence of the sovereign subsequent to the Revolution. Foremost amongst these may be placed the disputed succession to the crown. The Hanoverian succession was in very serious danger at the death of Queen Anne; and the continuing power of Jacobite intrigues was evidenced by the rebellions of 1715 and 1745. The divine right of kings, though permanently negatived at the Revolution, still continued for a time to be inculcated by the tory party, and by the great majority of the clergy, who taught the duty of passive obedience and the sinfulness of rebellion. But with the accession of the House of Hanover, the doctrine of divine right became attributable, in the minds of those who believed in it, not to the king *de facto* but to the heir of the Stuarts. Moreover, George I., from the necessity of the case, placed himself in the hands of the whig party, who had secured his accession to the throne; and the tories, influenced alike by party opposition and by personal objection to the new dynasty, found themselves in the somewhat unnatural position of opponents to the royal prerogative. And while on the one hand the personal influence of the sovereign was opposed by the tories, both on account of his lack of hereditary right, and of his alliance with their political foes, that influence itself was rapidly diminished by the increased development of the

(*e*) "There is not a doubt that the aggregate of direct influence normally exercised by the sovereign upon the counsels and proceedings of her ministers is considerable in amount, tends to permanence and solidity of action, and confers much benefit on the country, without in the smallest degree relieving the advisers of the crown from their undivided responsibility." . . . "It is a moral, not a coercive influence. It operates through the will and reason of the ministry, not over or against them. It would be an evil and a perilous day for the monarchy were any prospective possessor of the crown to assume or claim for himself, final, or preponderating, or even independent power, in any one department of the state."—Gladstone, Gleanings of Past Years, i. 42, 233.

system of party government working by means of the cabinet system (*f*).

One very important factor in the declension of the sovereign's personal influence, was his abstention, since the death of Queen Anne, from presiding at cabinet councils. In early times the king had been accustomed to preside in person at the Council board, and necessarily exercised an immense influence upon its determinations. Abandoned about the close of the fourteenth century, this practice was revived by the Tudor and Stuart monarchs, and was maintained, after the Revolution, by William III. and by Anne. William III., a man of consummate political ability, was, indeed, his own prime minister, his own foreign minister, and his own commander-in-chief. Queen Anne not only regularly presided at cabinet councils, but occasionally attended debates in the House of Lords. It was only at the accession of George I. that the king's ignorance of the English language and his indifference to English politics caused the introduction of the practice of cabinet councils being held, as in the ante-Tudor times Privy Councils had been held, without the presence of the sovereign. This practice—so essential to the free development of parliamentary government (*g*) has ever since been maintained, and on the principle *optimus interpres usus* may now be regarded as having ripened into a fixed rule of the constitution. It is remarkable, however, that like some other important features of our political institutions, such as the division of the legislative assembly into two instead of three Houses (*h*), the disappearance of the sovereign from the meetings of the cabinet should be due not to deliberate design but to a happy accident.

Reaches its lowest point under George I. and George II.

It is to the credit of George II.—narrow-minded and ignorant as he was—that throughout his long reign of

(*f*) See Lecky, Hist. of Eng., i. 217-227.

(*g*) "The presence of the king at the Cabinet either means personal government—that is to say, the reservation to him of all final decisions which he may think fit to appropriate—or else the forfeiture of dignity by his entering upon equal terms into the arena of general, searching, and sometimes warm discussion; nay, and even outvoting too, and of being outvoted; for in Cabinets, and even in the Cabinets reputed best, important questions have sometimes been found to admit of no other form of decision."—Gladstone, Gleanings of Past Years, i. 85.

(*h*) *Supra*, p. 243.

thirty-three years he discharged the duties of a constitutional king with honourable fidelity, loyally supporting the ministers to whom he had given his confidence, even at the expense of his own predilections. But it was not without an inward struggle that he did so. "Ministers are the king in this country," he once bitterly exclaimed (*i*): and relying upon his legal right to choose his own ministers, he occasionally opposed the accession to office of persons whom he disliked. William Pitt, the "Great Commoner," was an especial object of his antipathy, having made himself personally offensive to the king by his somewhat intemperate attacks upon the sovereign's Hanoverian partialities (*k*). But when the king finally yielded, he honestly gave his new minister a hearty support. "Sire," said Pitt, shortly after accepting office, "give me your confidence, and I will deserve it." "Deserve my confidence," was the king's reply, "and you shall have it." And the promise was faithfully kept (*l*).

Struggle of George III. against the ministerial system.

But though firmly, and, as the event has shown, permanently, established under the first two Georges, the system of parliamentary government had to undergo a severe struggle for existence throughout the reign of George III., who, not content with reigning, was determined also to govern. George III. was a young man of only twenty-two years of age when called to the throne by the sudden death of his grandfather. His education had been sadly mismanaged, so that his "book-learning," to quote the words of his mother, the Princess of Wales, was "small or useless" (*m*). And limited as was the range of his reading, his capacity to appreciate such authors as he had read was more limited still. "Was there ever such stuff," he exclaimed to Miss Burney, "as great part of

(*i*) Lord Mahon, Hist. of Eng., iii. 280.

(*k*) In a debate, in Dec. 1743, on a motion for defraying the cost of 16,000 Hanoverian troops, Pitt affirmed: "It is now too apparent that this great, this powerful, this formidable kingdom is considered only as a province to a despicable electorate, and that in consequence of a scheme formed long ago and invariably pursued, these troops are hired only to drain this unhappy nation of its money."—Lord Mahon, Hist. of Eng., iii. 207.

(*l*) Lecky, Hist. of Eng., ii. 466.

(*m*) Bubb Doddington's Diary, 357.

Shakespeare? only one must not say so!" (*n*). But in one subject, the estimation of his own rights and authority as sovereign, he had been only too well taught. From his tutor, Lord Bute, and from his mother—"whose ambition yielded to none" (*o*)—he had imbibed the most exalted notions of his royal dignity. "George, be king!" was the lesson which she sedulously instilled into his willing ear (*p*), and he grew up, as Lord Waldegrave, one of his governors, wrote in his private memoirs, "uncommonly full of princely prejudices contracted in the nursery, and improved by bedchamber-women and pages of the back-stair" (*q*). Yet he was a virtuous and honourable man, irreproachable as a son, a husband, and a father, frugal in his expenditure, shrewd and assiduous, but not always sagacious, in all the business of the state. Benjamin Franklin said of him that he could "scarcely conceive a king of better dispositions, of more exemplary virtues, or more truly desirous of promoting the welfare of his subjects." But the excellence of his character, and the patriotism of his motives, serve only to emphasise the lesson which the events of his reign have written large for the benefit of all his successors on the throne. He was determined, from the very outset, to re-assert the personal power of the sovereign, which had almost disappeared from the sphere of government since the accession of the House of Hanover, and to rule freed from the trammels of ministers and parties, for the people, indeed, but not by them. The very characteristics which, in a private station, would have been accounted to him as merits, rendered him so much the less fitted for the position of a constitutional king. During the first twenty-four years of his reign, by his meddlesome energy and restless activity in regulating every affair of state from the greatest to the least, combined with a resolute obstinacy in enforcing his own views against the opinion of his constitutional advisers, he succeeded in alienating the affections of his people, in reducing the nation from prosperity to the depths of adversity, and in depriving the country for ever of its

(*n*) Diary and Letters of Madame D'Arblay, Dec. 19, 1785 (ii. 398).
(*o*) H. Walpole, Mem. of Reign of Geo. III., i. 11.
(*p*) Earl of Albemarle's Rockingham Memoirs, i. 3.
(*q*) Lord Waldegrave's Memoirs, i. 9.

American colonies. Later on, his conscientious but absurd scruples as to his coronation oath, postponed, until the boon had lost much of its political efficacy, the just and statesmanlike measure of Roman catholic emancipation, which the younger Pitt had designed as a means of consolidating the United Kingdom. The naval and military glories of the latter half of his reign, the popularity of Pitt, whom both the king and the people trusted, and the melancholy illness of the sovereign, which at once enlisted the sympathies of the nation on his behalf and gave greater independence of action to his ministers, turned the current of popular opinion in his favour; and when he died, after years passed in mental and visual darkness, none but kindly thoughts followed the "good old king" to his grave.

The "king's friends."

In pursuance of his settled resolve to wrest all power from the hands of his ministers and to exercise it himself, George began his reign by calling to his aid a cabal of secret counsellors, with the Earl of Bute a peer of Scotland, formerly his tutor, and at that time his groom of the stole —at their head. These were mainly composed of tories whose Jacobite tendencies had hitherto kept them apart from public affairs, but who now, having "abjured their ancient master, but retained their principles" (*r*), brought to the service of the new sovereign the reverential sentiments which had distinguished the adherents of the Stuarts. Supported by these "king's friends" and their followers in the House of Commons, the king endeavoured to govern independently of both parliament and people, thwarted and opposed his ministers, and disturbed at his own will the vast amount of ecclesiastical, military, and civil patronage which, during the reigns of his two immediate predecessors, had been practically at the disposal of the cabinet.

The Bute and Grenville ministries.

On the second day after his accession (October 25, 1760), the king had caused Lord Bute to be sworn of the Privy Council, and admitted into the cabinet. The existing ministry, which had been formed in June, 1757, by a coalition of the Duke of Newcastle with the elder Pitt, were indeed retained in office, but Bute was the real adviser of the king, and held himself forth as the sole expounder of

(*r*) Walpole, Mem., i. 15, cited by May, Const. Hist., i. 13.

the royal will and opinions (*s*). Within five months (March 25, 1761) he was gazetted a secretary of state; within thirteen—having in the meantime got rid of Pitt, Newcastle, and the other ministers who declined to retain responsibility without power—the favourite attained the object of his ambition in May, 1762, as prime minister. A few days afterwards he obtained for himself the Order of the Garter. Such a rapid rise would have excited envy even in the case of a very able man; but Lord Bute was below mediocrity. By means of wholesale bribery of the House of Commons, he succeeded, with doubtful wisdom and in spite of the public wishes, in putting an end to the Seven Years' War, by the Peace of Paris (February 10, 1763). But his intense unpopularity both within and without parliament soon rendered his position as minister untenable; and afraid, as he himself declared, "not only of falling himself, but of involving his royal master in his ruin," he suddenly resigned on April 7, 1763—only, however, to retire to the interior cabinet, whence he hoped to direct more securely the measures of the new ministry which, under the presidency of Mr. George Grenville, the king had appointed, at the recommendation of his favourite. But the new premier was by no means contented to be the mere agent of Lord Bute, and the king ultimately found himself bound to dismiss the favourite from court, and to promise that he should not be suffered to interfere in the royal councils "in any manner or shape whatever."

Arbitrary measures of the king.

During the Bute and Grenville ministries, George III. entered on a course of arbitrary conduct which approached as nearly to the character of the Stuart government as the difference of circumstances would allow. The Duke of Devonshire—"the prince of the whigs," as the king's mother sarcastically termed him—having declined to attend the Council summoned to decide upon the peace with France—a measure highly unpopular with the nation—was insulted by the king, forced to resign his office of lord chamberlain, and was struck out of the list of privy councillors by the king's own hand. For presuming, as peers of parliament, to express disapprobation of the peace, the

(*s*) Lord Mahon, Hist. of Eng., iv. 322.

Dukes of Newcastle and Grafton and the Marquis of Rockingham were dismissed from the lord-lieutenancies of their several counties, and the Duke of Devonshire, to avoid a similar affront, found it necessary to resign. Earl Temple was also dismissed from the lord-lieutenancy, and struck off the list of privy councillors on account of his friendship for John Wilkes, whose journal, the *North Briton*, had excited the anger of the court by denouncing the peace and the ministry with unexampled boldness and bitterness. For their votes in parliament, General Conway, a brave soldier and honourable politician, was dismissed from his civil and military commissions, Colonel Barré and Colonel à Court were deprived of their military commands, and Lord Shelburne of his office of aide-de-camp to the king. Mr. Fitzherbert was removed from the Board of Trade, Mr. Calcraft from the office of deputy muster-master. All parliamentary placemen who failed to vote in accordance with the king's wishes were summarily dismissed, and even clerks in public offices and other small officials shared the fate of the patrons by whom they had been appointed (*t*). "To commit General Conway or Colonel Barré to prison," remarks Sir Erskine May, "as James I. had committed Sir Edwin Sandys, and as Charles I. had committed Selden and other leading members of the House of Commons, could not now have been attempted. Nor was the ill-omened adventure of Charles I. against the Five Members likely to be repeated; but the king was violating the same principles of constitutional government as his arbitrary predecessors. He punished, as far as he was able, those who had incurred his displeasure, for their conduct in parliament; and denied them the protection which they claimed from privilege and the laws of the country" (*u*).

The king's "policy of proscription" was soon, however, destined, for a time at least, to very ignominious failure. Very shortly after Mr. Grenville's appointment to the premiership, differences sprang up between him and the king. He had been intended by Lord Bute and the king to be merely the agent for carrying out their wishes; but although as narrow-minded and imperious in his political

The Rockingham ministry, 1765.

(*t*) Lord Mahon, Hist. of Eng., v. 23, 33, 53.
(*u*) May, Const. Hist., i. 30.

views as the king himself, he was also equally confident in his own abilities, equally fond of power, and equally unbending in maintaining what he conceived to be his rights. Twice did the king open negotiations with Pitt for the formation of a new ministry, but on each occasion without success. Though willing to receive Pitt, he could not bring himself to admit those other "ministers of the late reign who had attempted to fetter and enslave him," whom Pitt demanded as colleagues, but whom the king had declared he would "never upon any account suffer to come into his service while he lived to hold the sceptre" (*w*). At length in 1765, utterly wearied of the Grenville ministry, and determined at any cost to be rid of them, he found himself (July 13) reduced to the necessity of accepting as premier the whig Marquis of Rockingham, whom he had so recently removed from his lord-lieutenancy; while General Conway, who had been dismissed from an office in the king's household and from the command of his regiment, became secretary of state and ministerial leader of the House of Commons. But though forced by circumstances to place in office men whom he detested, George III. was still determined to have his own way. He now adopted a different system of tactics. Having, in 1766, vainly resisted in Council the proposal of his ministers to repeal the Stamp Act, which they deemed absolutely necessary for the conciliation of the American colonies, he opposed them in parliament by means of an organised opposition of the "king's friends," made up not only of independent members of the court party, but of office-holders under the crown, who were encouraged by the king to oppose his ministers, and were retained and protected in their offices while voting with the opposition.

The "king's friends" oppose the repeal of the Stamp Act, 1766.

After twelve months' tenure of office, Rockingham was dismissed by the king (July, 1766); and Pitt, who was now raised to the Upper House as Earl of Chatham, was prevailed upon to form an administration on non-party lines, with the Duke of Grafton as premier, he himself taking only the unimportant post of lord privy seal. The second ministry of Pitt was, however, anything but a success. The

Ministry of Grafton and Pitt, 1766.

(*w*) Bedford Correspondence, iii. 224.

"Great Commoner" lost his popularity by the acceptance of a peerage, and the mysterious and melancholy illness by which he was shortly prostrated, soon prevented him from taking any active part in the administration, from which he retired in October, 1768, leaving it to be carried on by the Duke of Grafton amidst ever-increasing difficulties.

At length in 1770, the Grafton ministry resigned; and the whig party being divided into two sections, composed of the respective followers of Rockingham and Chatham, the king adroitly seized the opportunity of their disunion to make Lord North—a tory, although chancellor of the exchequer in the late administration—his prime minister.

Influence of the king during Lord North's ministry, 1770-82.

It was during Lord North's administration, which lasted for twelve years (1770 to 1782), that the personal influence of the king attained its highest pitch. "Not only," we are told, "did he direct the minister in all important matters of foreign and domestic policy, but he instructed him as to the management of debates in parliament, suggested what motions should be made or opposed, and how measures should be carried. He reserved for himself all the patronage; he arranged the whole cast of the administration; settled the relative place and pensions of ministers of state, law officers, and members of the household; nominated and promoted the English and Scottish judges; appointed and translated bishops and deans; and dispensed other preferments in the church. He disposed of military governments, regiments, and commissions, and himself ordered the marching of troops. He gave and refused titles, honours, and pensions" (*x*). He was, in fact, as declared by Mr. Fox in the House of Commons, "his own unadvised minister," Lord North submitting to be the mere mouthpiece of his royal master, and continuing to carry on the American war, although, as he informed the king in 1779, "he held in his heart, and had held for three years past," the opinion that its continuance "must end in ruin to his Majesty and the country" (*y*).

To enforce his system of personal government the king professed himself ready to adopt the most extreme measures.

(*x*) May, Const. Hist., i. 58; Corr. of Geo. III. with Lord North, *passim*; and Wraxall's Mem., ii. 148.

(*y*) Correspondence of Geo. III. with Lord North, 1768-1783 (ed. Donne).

In 1770, when Lord Chatham was about to move an address for dissolving parliament, the king, in a conversation with General Conway, said, laying his hand upon his sword: "I will have recourse to *this* sooner than yield to a dissolution" (*z*). He several times threatened to abdicate and retire to Hanover rather than accept ministers or measures of which he disapproved: a threat which was on one occasion met by the significant remark of Lord Thurlow: "Your Majesty may go; nothing is more easy; but you may not find it so easy to return when your Majesty becomes tired of staying there" (*a*).

The royal veto.

Since the accession of the House of Hanover, no sovereign of this country has exercised the prerogative of refusing the royal assent to a bill which has passed both Houses (*b*), but it is not surprising to find that George III. was prepared to do so. "I hope," he wrote to Lord North, in 1774, "the crown will always be able in either House of Parliament to throw out a bill; but I shall never consent to use any expression which tends to establish that at no time the right of the crown to dissent is to be used" (*c*).

Dunning's resolutions on the influence of the crown, 1780.

At length, in 1780, Mr. Dunning proposed and carried in the House of Commons his celebrated resolutions affirming "that the influence of the crown has increased, is increasing, and ought to be diminished" (*d*); but it was not until the lapse of two more years, and after repeated motions of want of confidence in the government, that Lord North was compelled to resign office. The king was now once more forced to fall back upon the whigs, and Lord Rockingham again (March 1782) became prime minister. He died, however, in the July following, when the king conferred the office of first lord of the treasury upon the Earl of Shelburne, the leader of the Chathamite section of the whig party—a choice which caused a large part of the ministry, including Charles James Fox, Burke,

Ministry of Lord Shelburne, 1782.

(*z*) Rockingham, Mem., ii. 179.

(*a*) May, Const. Hist., i. 64.

(*b*) The last occasions on which the prerogative of rejecting bills was exerted were in 1692 and 1694, when William III. refused the royal assent to the Bill for Triennial Parliaments and the Place Bill, and in 1707, when Queen Anne rejected a Scotch Militia Bill.

(*c*) Lord Brougham's Works, iii. 85.

(*d*) Cobbett's Parl. Hist., xxi. 347.

and the Duke of Portland, who represented the Rockingham section, to resign and go into factious opposition. Lord Shelburne continued in office long enough to conclude the Peace of Versailles (January 20, 1783), by which George III. at length acknowledged, without reserve, the independence of the United States of America. But when the preliminary articles of peace were laid before parliament, the discontented whig faction led by Fox entered into an unnatural coalition with the followers of Lord North, and by their adverse majority in the House of Commons compelled Lord Shelburne to resign.

The Coalition ministry, 1783.

The king struggled hard against "his new tyrants," the successful leaders of the coalition. Twice he vainly solicited the younger Pitt—who had recently held office for the first time as Lord Shelburne's chancellor of the exchequer to form an administration; but at length (April 2, 1783), he found himself constrained to accept the coalition ministry, of which the Duke of Portland, Fox, and Lord North were the chiefs. Chafing at his renewed bondage, the king now thwarted his ministers to the utmost of his power, and revived the unconstitutional tactics of 1766, through an organised opposition in parliament by means of "the king's friends."

The "king's friends" oppose Fox's India bill.

In order to defeat in the lords the India bill introduced by Mr. Fox, secretary of state, Lord Temple was authorised to protest against it in the king's name and to canvass the peers against this measure of his own ministers. "His Majesty," the king wrote on a card, as an authority for the proceeding, "allows Earl Temple to say that whoever voted for the India bill was not only not his friend, but would be considered by him as an enemy; and if these words were not strong enough, Earl Temple might use whatever words he might deem stronger, and more to the purpose" (*e*).

Use of the king's name.

Indignant at this conduct, the commons passed a resolution, on December 17, 1783, "that to report any opinion, or pretended opinion, of his Majesty, upon any bill, or other proceeding, depending in either House of Parliament, with a view to influence the votes of the

(*e*) Duke of Buckingham's Court and Cabinets of George III., i. 288, 289; May, Const. Hist., i. 68.

members, is a high crime and misdemeanour, derogatory to the honour of the crown, a breach of the fundamental privileges of parliament, and subversive of the constitution" (*f*). On the very day that this resolution was passed, the House of Lords rejected the India bill, and on the following day the king dismissed his ministers.

Dismissal of the Coalition ministry, 1783.

This abrupt and contemptuous dismissal of a ministry who were supported by a vast majority in the House of Commons brought the king into critical conflict with his parliament, from which he was only saved by the genius, perseverance, and tact of William Pitt, who now consented to undertake the formation of a government. In spite of votes of want of confidence, and of attempts to prevent a dissolution by postponing the supplies, the youthful premier of twenty-five gained the enthusiastic support of the nation, and within four months the opposition majority, which had been two to one against the ministry, dwindled down to a bare majority of one. Parliament was now dissolved; and a general election gave to Pitt an overwhelming majority, which maintained him in power for seventeen years. The triumph of the king and the minister was complete; the ascendancy of the crown was established, and continued, for nearly fifty years, to prevail over every other power in the state. But the king's will was no longer supreme, as it had been during the administration of Lord North. Although he continued his accustomed activity in public affairs, "he had now a minister who, with higher abilities and larger views of state policy, had a will even stronger than his own. Throughout his reign it had been the tendency of the king's personal administration to favour men whose chief merit was their subservience to his own views, instead of leaving the country to be governed—as a free state should be governed—by its ablest and most popular statesmen. He had only had one other minister of the same lofty pretensions—Lord Chatham; and now, while trusting that statesman's son—sharing his councils, and approving his policy—he yielded to his superior intellect" (*g*). The

The king's personal influence diminished;

but still very powerful.

(*f*) Comm. Journ., xxxix. 842.
(*g*) May, Const. Hist., i. 78.

wishes of the king, however, still exercised great influence on the ministers in the general policy of the government; and it was the king's persistent refusal to sanction the introduction of a measure for the relief of the Roman catholics which at length caused Pitt, in 1801, to resign. Out of personal regard for the king, he shortly afterwards promised never to revive the catholic question; and on his again taking office in 1804, he was prevented from strengthening his government by the admission of Mr. Fox to the cabinet, by the king's absolute refusal. George declared "that he had taken a positive determination not to admit Mr. Fox into his councils, *even at the hazard of a civil war*" (*h*).

During the successive ministries of Addington (1801), Pitt (1804), Grenville, Fox, and Addington, known as "All the Talents" (1806), Portland (1807), and Perceval (1809), down to the year 1810, when the king's mental disease necessitated the appointment of a regency, the personal influence of the sovereign remained predominant. In 1807, George III. even went so far as to require a written declaration from the Grenville ministry that they would never, under any circumstances, propose to him further concessions to the Roman catholics, *or even offer him any advice upon the subject* (*i*). This flagrantly unconstitutional pledge, which Sir Samuel Romilly maintained in parliament, would have rendered any ministers who gave it guilty of a high crime and misdemeanour (*k*), was firmly but respectfully refused, and the refusal was immediately followed by the dismissal of the ministry.

Diminution of personal influence of the sovereign since the reign of George III.

Since the reign of George III., but more especially since the Reform Act of 1832 made the House of Commons what it had ceased to be—a body really representing the opinions of the largest estate of the realm, the commons of England—the personal influence of the sovereign in the executive administration has steadily declined. It has, however, been asserted at intervals with effect. Under George IV.,

Its occasional assertion.

(*h*) Rose's Diaries and Corr., ii. 156, 182; Horace Twiss, Life of Eldon, i. 446 *seq.*

(*i*) Letter of Lord Grenville to Marquis of Buckingham, Mar. 17, 1807, in Buckingham's Court and Cabinets of Geo. III., iv. 143.

(*k*) Hansard, 1st Ser., iv. 327.

the influence of the crown remained paramount, and the two great parties in the state sought the royal favour first, as the avenue to parliamentary support. Yet it was in this reign that the remnant of independent kingship which had survived the Revolution, and even acquired renewed vigour and extension in the fostering hands of George III., may be said to have expired on the day when that king's son and successor, after a prolonged struggle, finally gave his consent to the bill for Roman catholic emancipation in 1829 (*l*). William IV., indeed, in November 1834, endeavoured to assert his personal wishes in the choice of a ministry, without reference to the will of parliament, by suddenly dismissing the whig ministry of Lord Melbourne, and entrusting to Sir Robert Peel the formation of a government from a party whose followers numbered less than a fourth of the House of Commons (*m*). But the impolicy of the act exceeded even its unconstitutionality. The new premier dissolved parliament; and the general election again returned a liberal majority, much smaller indeed than the former one, but sufficient, more compact, and better organised.

The Melbourne ministry, 1835.

After a gallant struggle—in which he rivalled the great qualities formerly displayed by Pitt—against the hostile majority which his appeal to the country had evoked, Peel was compelled to resign, and in April, 1835, the Melbourne ministry, with some alterations, was reinstated in office. It was still in power at the accession of Queen Victoria, and was at once honoured with her confidence.

Growing unpopularity caused the Melbourne ministry to resign in 1839, and the summons of Sir Robert Peel

(*l*) See Gladstone, Gleanings, i. 38, 78.

(*m*) "The right of the king to dismiss his ministers," observes Sir Erskine May, "was unquestionable: but constitutional usage has prescribed certain conditions under which this right should be exercised. It should be exercised solely in the interests of the state, and on grounds which can be justified to parliament, to whom, as well as to the king, the ministers are responsible. . . . It was not directly alleged that the ministers had lost the confidence of the king; and so little could it be affirmed that they had lost the confidence of parliament that an immediate dissolution was counselled by the new administration. The act of the king bore too much the impress of his personal will, and too little of those reasons of state policy by which it should have been prompted; but its impolicy was so signal as to throw into the shade its unconstitutional character." Const. Hist., i. 147.

to form an administration gave rise to what is known as the "Bedchamber Question." Nearly all the ladies of the household were related to the members of the Melbourne cabinet, or to their political adherents; and Sir Robert Peel, convinced of the difficulties which would beset a minister who should leave about her Majesty's person the nearest relatives of his political opponents, informed the queen that he could not undertake the formation of a ministry unless he was permitted to make some changes in the higher offices of the court, including the ladies of her bedchamber. The queen, by the advice of Lord Melbourne and his colleagues, refused "to adopt a course which she conceived to be contrary to usage, and which was repugnant to her feelings." Sir Robert Peel declined to accept office on those terms; and the Melbourne ministry conducted the government for two years longer. It again resigned in 1841, after an appeal to the country had failed to reverse the verdict of the House of Commons, pronounced by a majority of one, on a resolution of Sir Robert Peel, affirming that the ministers of the crown did not possess the confidence of the House of Commons, and "that their continuance in office under such circumstances was at variance with the spirit of the constitution." On assuming office, Peel met with no further difficulties on the bedchamber question; and the principle for which he contended has since been admitted, on all sides, to be constitutionally correct (*n*).

The Bedchamber Question, 1839.

Sir Robert Peel, premier, 1841.

The latest illustration of the personal share which the sovereign takes in public business is afforded by the memorandum communicated by the queen, in 1850, through Lord John Russell, her prime minister, to Lord Palmerston, the secretary of state for foreign affairs. "The queen requires," it declared, "first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the queen may know as distinctly to what she

The queen's memorandum on the relations of a secretary of state to the crown, 1850.

(*n*) By the existing arrangement, which has now long prevailed, the mistress of the robes, who is only an attendant at court on great occasions, changes with the ministry; but the ladies in waiting, who are periodically resident at the court, and by virtue of their office enjoy much closer personal contact with the queen, are appointed and changed without regard to the political connections of their husbands. Gladstone, Gleanings, i. 40.

is giving her royal sanction. Secondly, having once given her sanction to a measure, that it be not arbitrarily altered or modified by the minister. Such an act she must consider as failing in sincerity towards the crown, and justly to be visited by the exercise of her constitutional right of dismissing that minister. She expects to be kept informed of what passes between him and the foreign ministers before important decisions are taken based upon that intercourse; to receive the foreign despatches in good time; and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off." But in controlling one minister the sovereign still acts upon the advice and responsibility of another—her first minister- to whom copies of despatches and other information are also communicated in order to enable him to give such advice effectually (*o*).

Constitutional right of dismissing a minister.

The constitutional right of dismissing a minister, asserted in the queen's memorandum, is now practically placed at the disposal of the premier and the cabinet, who are thus enabled as a whole, to exercise, through the crown, a check upon each individual member. This was exemplified, shortly after the French *coup d'état* of December 2, 1851, when Lord Palmerston was removed from the foreign secretaryship in Lord John Russell's administration on the ground that he had exceeded his authority in expressing to the French ambassador opinions favourable to the policy of the recent *coup d'état* and at variance with the non-intervention despatch agreed upon by the cabinet (*p*).

Increased power of the executive.

While the personal influence of the sovereign in the government of the country has steadily decreased since the reign of George III., the power of the crown, as wielded by its ministers, has continued to increase from the Revolution down to the present time. The expansion of the empire, the great extension of public establishments, the vast increase of patronage- civil, military, and ecclesiastical—and the more profuse distribution of honours,

(*o*) Statement by Lord John Russell, Hansard Deb., 3rd ser., cxix. 91; May, Const. Hist., i. 160; Martin, Life of the Prince Consort, ii. 300 *seq.*
(*p*) May, Const. Hist., i. 161.

have all largely added to the influence of the executive government, while its coercive power has been augmented by the establishment of the police, the recent concentration of the military forces, the abolition of purchase in the army, and the transfer of the command and jurisdiction over the auxiliary forces to the sovereign, to be exercised through the secretary of state for war. During the reign of Queen Victoria the power and influence of the crown, always wisely and constitutionally exercised for the public benefit, on the advice of responsible ministers, provoked no attempts at restraint; and the personal power of the sovereign, as distinguished from the power of the regal office, having been restrained within due limits, the ancient jealousy of the crown, inherited from the struggles of our ancestors, may now almost be said to have died out.

Revenues of the crown.

It was at the Revolution that a limitation was for the first time imposed upon the personal expenditure of the sovereign. Previously it had been customary for the parliament, at the commencement of each reign, to grant to the king the ordinary crown revenues, consisting of (1) the hereditary revenues of the crown itself, viz., the rents of crown lands, the feudal rights (surrendered by Charles II. in 1660, in exchange for the excise duties), the proceeds of the post-office and wine licences; and (2) the produce of taxes voted to the king for life. The annual revenue of Charles II. from these sources was sometimes a little above, sometimes a little below, the sum of £1,200,000, which was fixed by parliament as the ordinary revenue of the crown; that of James II. amounted on an average to £1,500,964 a year, out of which the king was expected, in time of peace, to support the royal dignity and civil government and also the public defence. But whatever remained after payment of these necessary expenses of the government was at the king's absolute disposal; in addition to which Charles II. did not hesitate to apply to his own privy purse large sums of money which had been specially appropriated by parliament for the purposes of war. At the accession of William and Mary, however, parliament fixed the annual revenue of the crown, in time of peace, at £1,200,000, of which about £700,000

The civil list.

(derived from the hereditary revenues of the crown, and from a part of the excise duties) was separately appropriated to what was afterwards called the king's "civil list," comprising the personal expenses of the king, the support of the royal household, and also the payment of civil officers and pensions, which were more fairly chargeable to the remaining portion of the crown revenue devoted to the strictly public expenditure of the state.

The principle that the king's regular and domestic expenses should be restricted to a fixed annual sum distinct from the other departments of public expenditure, was adhered to in succeeding reigns, and down to the accession of George II. the civil list was maintained at £700,000. Both Anne and George I., however, incurred debts, the former of £1,200,000, the latter of £1,000,000, which were discharged by parliament by loans charged upon the civil list itself. The civil list of George II. was fixed at a minimum of £800,000, parliament undertaking that if the hereditary revenues should produce less than that sum it would make up the deficiency—a liability which it discharged in 1746, by paying off a civil list debt of £456,000. But the direct control of parliament over the personal expenses of the king was first acquired on the accession of George III., who surrendered to the nation his life interest in the hereditary revenues, and all claims to any surplus which might accrue from them, in return for a fixed civil list of £800,000 (increased in 1777 to £900,000) "for the support of his household, and the honour and dignity of the crown." In addition, however, to the fixed civil list, George III. enjoyed a considerable further income, derived from the droits of the crown and admiralty and other sources, which was wholly independent of parliamentary control; and yet, notwithstanding the king's economical and even parsimonious mode of living, and the removal, from time to time, from the civil list of various charges which were unconnected with the personal comfort and dignity of the sovereign, his struggle to establish the ascendancy of the crown by systematic bribery of members of parliament with places, pensions, and direct gifts of money, compelled him to make repeated applications to the nation for payment of debts upon the civil list.

Altogether, the arrears paid off by parliament during his reign—exclusive of a debt of £300,000 charged on the civil list in 1782, when its expenditure was curtailed and split up into separate classes—amounted to a total of £3,398,000 (*q*).

William IV., on his accession, surrendered not only the hereditary revenues, but all the other sources of revenue which had been enjoyed by his predecessors; receiving in return a civil list of £510,000, which was at the same time relieved from most of the charges which more properly belonged to the civil government of the State. The civil list of Queen Victoria was settled, on the same principles, at the annual sum of £385,000; that of the late King Edward VII. and Queen Alexandra at £470,000, and that of their present Majesties King George V. and Queen Mary at a somewhat higher figure. While the removal of civil charges has freed the crown from any suspicion of indirect influences, the improved administration and application of the finances available for the support of the dignity of the crown have, under the last four reigns, rendered it unnecessary to apply to parliament for the discharge of debts upon the civil list.

Crown lands.

The surrender of the crown lands to be disposed of by parliament, like the other revenues of the state, for the public service—begun by George III. and now "by a custom as strong as law" repeated by each sovereign at the beginning of his reign—is one instance among others of the return in modern constitutional usage to the simpler principles of the older constitution. We have seen, in an earlier chapter, how the *folkland*, the land of the nation, which could not be alienated without the consent of the witan, gradually changed into *terra regis*, the land of the king, to be dealt with according to his personal pleasure (*r*). Continually augmented by feudal escheats and forfeitures the crown lands were as continually diminished by improvident grants to the royal favourites and followers. Attempts were made to check this abuse from time to time, but without effect, and Charles I. still further

(*q*) Report on Civil List, 1815, p. 4; May, Const. Hist., i. 243.
(*r*) *Supra*, pp. 13-15.

diminished the royal patrimony by extensive sales and mortgages. His example was followed by the parliaments of the Commonwealth; and although at the Restoration these latter sales were declared void, Charles II. soon squandered the estates which had been restored to the crown, and in three years reduced their annual income from £217,000 to £100,000. James II. and William III. were equally liberal and improvident, and, on the accession of Queen Anne, it was found by parliament that the crown lands had been so reduced that the net income from them scarcely exceeded the rent-roll of a squire (*s*). To preserve what still remained, an Act was passed (1 Anne, c. 8, s. 5) which, after sadly reciting "that the necessary expenses of supporting the crown, or the greater part of them, were formerly defrayed by a land revenue, which had, from time to time, been impaired by the grants of former kings and queens, so that her Majesty's land revenues could then afford very little towards the support of her government," prohibited absolute grants entirely, and prescribed stringent conditions as to the length of term and rentals of all future leases. Thus the small remnant of the land which had once been the land of the people was saved from utter dissipation, and since its restoration to the nation by George III. "the *terra regis* of the Norman has once more become the *folkland* of the days of our earliest freedom" (*t*).

Private property of the sovereign.

This change has been accompanied by the restoration to the crown of a right which it had lost during its uncontrolled tenure of the hereditary estates. During the days when the folkland was really the land of the people, the king, equally with the subject, had enjoyed the right of inheriting, purchasing, devising, and otherwise dis-

(*s*) The crown lands received some augmentation from forfeitures after the rebellions of 1715 and 1745; but during the first 25 years of Geo. III. they produced a net average rental of little more than £6,000 a year. Improved administration and the rise in the value of land have since rendered them much more productive. In 1798 they were valued at £201,250 a year; in 1812 at £283,160; in 1820 they actually yielded £314,852; in 1830 they produced £373,770; and in 1860 they returned an income of £416,530, exceeding the civil list granted to the queen. May, Const. Hist., i. 255. [The income from crown lands in 1917 amounted to £1,151,451.—Ed.]

(*t*) Freeman, Growth of Eng. Const., p. 134.

posing of lands which were his own private property (*u*). But when the kingship had become more strictly hereditary, and the lands of the nation came to be regarded as the property of the king, the person and the office of the king were held to be so thoroughly identified that his private estates were merged in the royal demesne and made incapable of alienation by will. After the restoration of the crown lands to the nation, it was felt to be reasonable "that a restriction which belonged to a past state of things should be swept away, and that sovereigns who had surrendered an usurped power which they ought never to have held should be restored to the enjoyment of a natural right which ought never to have been taken from them" (*w*). Accordingly the sovereign has again been invested with the right of acquiring and disposing of private property in the same manner as any other member of the nation (*x*).

II. *The House of Lords.*

Since the Revolution, the House of Peers the lineal representative of the old Great Councils and the older witenagemots (*y*)—has undergone changes in its numbers, composition, and political weight and influence, greater even than the changes which, during the same period, have so materially affected the practical exercise of the authority of the crown in government and legislation. In the parliament of 1454, the last held before the outbreak of the Wars of the Roses, the number of lay peers who attended was fifty-three. In 1485, only twenty-nine received writs of summons to the first parliament of Henry VII. (*z*). The greatest number summoned by Henry VIII. was fifty-one, which had increased at the death of Elizabeth to fifty-nine. In the meantime, by the suppression of the monasteries and the consequent removal from the Upper House of about

Number of peers.

(*u*) *Supra*, p. 13.

(*w*) Freeman, Growth of Eng. Const., p. 136; and see Allen, Royal Prerogative, p. 154.

(*x*) See 39 & 40 Geo. III. c. 88; 4 Geo. IV. c. 18; 25 & 26 Vict. c. 37.

(*y*) *Supra*, pp. 208, 209. [*Cf.* L. O. Pike, Const. Hist. House of Lords, pp. 23-26.—Ed.]

(*z*) *Supra*, p. 346.

thirty-six abbots and priors, the spiritual peerage (including five of the new sees created by Henry VIII.) (*a*) had been reduced to the number of twenty-six, at which it has ever since remained.

Rapid increase under the Stuart kings.

The four Stuart kings created 193 new peers, but as during their reigns ninety-nine peerages became extinct, the number of the peerage at the Revolution of 1688 actually stood at about 150, which was raised by William III. and Queen Anne to 168. The House of Lords was further increased in 1707, on the passing of the Act of Union with Scotland, by the addition of sixteen representative peers from that kingdom, elected at the commencement of every Parliament. This rapid augmentation of the peerage, but more especially the realisation of the power of the crown to swamp the majority in the Upper House (manifested in 1711 by Queen Anne's creation of twelve peers in one batch), excited the jealousy of the lords; and this feeling—acting in conjunction with the fear lest the Prince of Wales, who was in opposition to his father, should on coming to the throne make use of his prerogative to overthrow the whig majority in the Upper House by the creation of Tory peers—induced the whig ministry of Sunderland and Stanhope in 1719 and 1720 to support proposals for the limitation of the royal prerogative of creating peers. With the concurrence of George I., bills were introduced, in the former year by the Duke of Somerset, and in the latter by the Duke of Buckingham, providing that, with an exception in favour of princes of the blood, the crown should be restrained from augmenting the then existing number of 178 peerages by more than six, although new peerages might be created in the place of any which should become extinct; and that twenty-five hereditary peers should be substituted for sixteen elective peers of Scotland. This unconstitutional scheme was strongly opposed in the House of Commons by Sir Robert Walpole and others, and finally rejected by a large majority (269 to 177) (*b*). Its passing would have transformed the House of Lords into a close aristocratic body, independent alike

Addition of 16 representative peers of Scotland, 1707.

Attempts to limit the prerogative of creating peers, 1719, 1720.

(*a*) *Supra*, p. 362.
(*b*) Lord Mahon, Hist. of Eng., i. 530-546.

of the crown and of the people. It would have eliminated from the complex mechanism of the constitution what has been termed its "safety-valve" (*c*)—that peer-creative power by which the sovereign, on the advice of his responsible ministers, is enabled, in cases of great emergency, to force the peers to bow to the will of the people, expressed by their representatives in the House of Commons, and thus to render possible the smooth and continuous working of our present system of parliamentary government.

Profuse creation of peers under George III.

At the accession of George III. the number of peerages amounted to only 174, but throughout his long reign new creations were multiplied with unprecedented profusion. In the earlier part of his reign the peer-creative power was mainly wielded by the king himself, as one means of carrying out his determination to break up the system of party government; but the younger William Pitt, on acceding to office, employed it for another and a far nobler purpose. The consolidation of his own authority as minister was naturally one of the objects which he had in view, but his great aim was to reform the House of Lords by changing it from a narrow and exclusive caste into a large representation of the intellect, the achievements, and more especially of the wealth of England. He wished, he said in effect, "to reward eminent merit, to recruit the peerage from the great landowners and other opulent classes, and to render the crown independent of factious combinations among the existing peers" (*d*). With this object, while himself disdaining honours, he dispensed them to others with the greatest profusion. In the first five years of his administration he created forty-eight new peers; at the end of eight years he had created between sixty and seventy; and later, in the two years 1796-1797, he created no less than thirty-five. In 1801, at the end of his seventeen years' administration, his creations had reached the total of 141.

Pitt and the peerage.

The example set by Pitt was followed by succeeding ministers, and at the end of George III.'s long reign of sixty years the actual number of peerages conferred by that king (including some promotions of existing peers to a

(*c*) Bagehot, Eng. Const., 229.

(*d*) Speech on January 16, 1789, Cobbett's Parl. Hist., xxvii. 942, 943; May, Const. Hist., i. 278

higher rank) amounted to the enormous number of 388. The House of Lords was further augmented on the union with Ireland in 1801, by the addition of twenty-eight Irish representative peers, elected, not for each parliament only like the Scottish representative peers, but for life (*e*). At the same time four Irish bishops were admitted to seats in the Upper House of the United Kingdom, sitting by rotation of sessions as representatives of the Irish episcopate. But on the disestablishment of the Church of Ireland in 1869, the Irish bishops lost their seats in parliament (*f*).

Addition of 28 representative peers of Ireland, 1801.

The peerages of Scotland and Ireland.

(*e*) There were other differences in the mode of treating the Scottish and Irish peerages. From the date of the union with Scotland the crown has been debarred from creating any new Scottish peers, but the then existing peerage of Scotland was perpetuated in its integrity. On the union with Ireland, however, it was determined gradually to diminish the excessive numbers of the Irish nobility, and it was therefore provided by the Act of Union that only one Irish peerage should be created for every three which should become extinct, until the reduction of the number to 100, *at which figure it should be maintained* by the creation of one Irish peerage as often as a peerage became extinct, or as often as an Irish peer should become entitled, by descent or creation, to a peerage of the United Kingdom. At the same time the privilege was granted to all Irish peers (except the representative twenty-eight for the time being) of sitting in the House of Commons if elected by any constituency in Great Britain but not in Ireland. The peerage of both Scotland and Ireland has been undergoing a process of gradual absorption into the peerage of the United Kingdom. In order to adjust the inadequate representation of their peerage, Scottish peers have, of recent years, been admitted in more considerable numbers to hereditary seats in the House of Lords of the United Kingdom. By the Act of Union, 1706 (5 Anne, cap. 8), the number of Scottish representative peers is fixed at 16, who are *elected for each Parliament*, by a convocation of all Scottish peers meeting at Holyrood the election taking place by vote.

The peerage of Ireland, which in 1801 numbered 234, has been reduced by extinctions, and, of the number remaining, after deducting those who are also peers of the United Kingdom, 28 are, under the Act of Union, 1801 (39 & 40 Geo. III., cap. 67, sec. 4), *elected for life*, as representative peers. The spiritual lords of Ireland were excluded from the House of Lords on the passing of the Irish Church Act (1869). [For the mode of election, *vide* Ridges, Const. Law of Engl. (1915) p. 77; and also as to the status of the Scottish peers, *cf.* L. O. Pike, Const. Hist. House of Lords, pp. 366 *seq.*—Ed.]

(*f*) Attempts were made in 1834, 1836, and 1837, to exclude the episcopal element altogether from the House of Lords, but unsuccessfully. It was, however, determined by the legislature in 1847, when a new bishopric was created for Manchester, that no increase in the existing number of twenty-six bishops in the Upper House should take place (10 & 11 Vict. c. 108). The two archbishops, and the bishops of London, Durham, and Winchester have always a right to sit in parliament, but the bishop last elected to any other see (except Sodor and Man, whose bishop is in no case a lord of

Changes in the character and composition of the House of Lords.

The vast increase in the peerage under George III. affected not merely the numbers but the whole character of the House of Lords. "Up to this time," observes a recent historian (*g*), "it had been a small assembly of great nobles, bound together by family or party ties into a distinct power in the state. By pouring into it members of the middle and commercial class, who formed the basis of his political power, small landowners, bankers, merchants, nabobs, army contractors, lawyers, soldiers, and seamen, Pitt revolutionised the Upper House. It became the stronghold, not of blood, but of property, the representative of the great estates and great fortunes which the vast increase of English wealth was building up. For the first time, too, in our history, it became the distinctly conservative element in our constitution. The full import of Pitt's changes has still to be revealed, but in some ways their results have been very different from the end at which he aimed. The larger number of the peerage, though due to the will of the crown, has practically freed the House from any influence which the crown can exert by the distribution of honours. This change, since the power of the crown has been practically wielded by the House of Commons, has rendered it far harder to reconcile the free action of the lords with the regular working of constitutional government. On the other hand, the larger number of its members has rendered the House more responsive to public opinion, when public opinion is strongly pronounced; and the political tact which is inherent in great aristocratic assemblies has hitherto prevented any collision with the Lower House from being pushed to an irreconcilable quarrel. Perhaps the most direct result of the change is seen in the undoubted popularity of the House of Lords with the mass of the people. The large number of its members, and the constant additions to them from almost every class of the community, has secured it as yet from the suspicion and ill-will which in almost every other con-

parliament), cannot claim a seat until another vacancy has occurred. May, Const. Hist., i. 301; Stephen, Comm. (16th ed. 1914), ii. 473. [L. O. Pike, Const. Hist. House of Lords, p. 369; Anson, Law and Custom of the Const., vol. i. (1911), p. 210.—Ed.]

(*g*) J. R. Green, Short Hist. of Eng. People, p. 792.

stitutional country has hampered the effective working of a second legislative chamber."

Political position of the House of Lords.

The largely increased numbers of the House of Lords, and the more representative character which it has acquired through the changes in its composition here briefly sketched, have enabled it to preserve very much of its ancient authority and political influence. But it has nevertheless tended—especially since the Reform Act of 1832—to decline more and more from the position which it still theoretically occupies, of a coordinate legislative power, and to become simply a revising and suspending House—altering and modifying bills sent up from the commons, rejecting them sometimes when the mind of the nation is not thoroughly made up in their favour, but yielding to the national will whenever unequivocally expressed (*h*).

Opposition of the lords to the Reform bills of 1831 and 1832 overcome by a threatened creation of peers.

The constitutional position of the lords with regard to legislation of which they disapprove, but which is supported by the ministers of the crown, the House of Commons, and the people, may be said to have been definitely settled by the result of the memorable struggle with the Upper House in 1831 and 1832 on the passing of the Reform Bill. After sixteen peers had been created to assist the progress of the measure, the continued opposition of the House of Lords was at length overcome by the private

(*h*) The Earl of Derby, in speaking against the second reading of the Corn Importation bill, in 1846, said: "My lords, if I know anything of the constitutional importance of this House, it is to impose a salutary obstacle to rash and inconsiderate legislation; it is to protect the people from the consequences of their own imprudence. It never has been the course of this House to resist a continued and deliberately expressed public opinion. Your lordships always have bowed, and always will bow, to the expression of such an opinion; but it is yours to check hasty legislation leading to irreparable evils." (Hansard, Deb. lxxxvi., p. 1175.) Similarly, Lord Lyndhurst, speaking on the second reading of the Oaths bill, in 1858, said in the House of Lords: "It is part of our duty to originate legislation; but it is also a most important part of our duty to check the inconsiderate, rash, hasty, and undigested legislation of the other House;—to give time for consideration; and for consulting or perhaps modifying the opinions of the constituencies; but I never understood, nor could such a principle be acted upon, that we were to make a firm, determined, persevering stand against the opinion of the other House of Parliament, when that opinion is backed by the opinion of the people; and, least of all, on questions affecting, in a certain degree, the constitution of that House, and popular rights. If we do make such a stand, we ought to take care that we stand on a rock." (Hansard, Deb., 3rd ser., ii. p. 1768.)

persuasions of the king, and the knowledge that he had consented to his ministers' request for power to create a sufficient number of peers to ensure a majority (*i*).

The threatened creation of peers was denounced at the time by the Duke of Wellington and the tory party generally as "an unconstitutional exercise of the prerogative"; but it was admirably answered by Earl Grey: "I ask what would be the consequences if we were to suppose that such a prerogative did not exist, or could not be constitutionally exercised? The commons have a control over the power of the crown, by the privilege, in extreme cases, of refusing the supplies; and the crown has, by means of its power to dissolve the House of Commons, a control upon any violent and rash proceedings on the part of the commons; but if a majority of this House is to have the power, whenever they please, of opposing the declared and decided wishes both of the crown and the people, without any means of modifying that power,—then this country is placed entirely under the influence of an uncontrollable oligarchy. I say that, if a majority in this House should have the power of acting adversely to the crown and the commons, and was determined to exercise that power, without being liable to check or control, the constitution is completely altered, and the government of this country is not a limited monarchy: it is no longer, my lords, the crown, the lords, and the commons, but a House of Lords—a separate oligarchy—governing absolutely the others" (*k*).

An extraordinary creation of peers equivalent to a dissolution.

In its practical aspect, an extraordinary creation of peers is to the House of Lords what a dissolution is to the House of Commons; and although such a creation ought never to be made use of except in the greatest emergency, its use in such an emergency is not only constitutional, but essential to the safety of the constitution itself (*l*).

(*i*) "The king grants permission to Earl Grey, and to his chancellor, Lord Brougham, to create such a number of peers as will be sufficient to ensure the passing of the Reform Bill—first calling up peers' eldest sons. WILLIAM R., Windsor, May 17th, 1832." Roebuck, Hist. of the Whig Ministry, ii 331, 333. [See *infra*, pp. 769 *seq.*, for the latest development of this constitutional question—the "guarantees" asked of King George V. by the prime minister (Mr. Asquith) to ensure the passing of the Veto bill.—ED.]

(*k*) Hansard, Deb. 3rd ser. xii. 1006 (May 17, 1832).

(*l*) See May, Const. Hist., i. 315.

The political weight of the Upper House has been to some extent injuriously affected by the indifference to public business displayed (though with many brilliant exceptions) by the great body of its members, and by their scanty attendance, favoured by the rule which requires only three peers to make a quorum, and by the practice of giving proxies. By a resolution of the House in 1868, this latter practice has been advantageously discontinued; but the attempts made, in 1855 by the crown, and in the following year by bill founded on the recommendation of a committee of the lords, to increase the critical power and representative character of the Upper House by calling up men of ability as life-peers, were unfortunately defeated (*m*).

Proxies discontinued, 1868.

Attempts to revive life peerages.

When status of peerage arises.

[A constitutional question of some importance and significance was raised in 1894—that of the Hon. Bernard Coleridge, M.P. for the Attercliffe Division of Sheffield, who, as eldest son of his father, a peer, and succeeding to his father's title, applied for the "Chiltern Hundreds" (*n*). The question was raised in the House of Commons as a matter of privilege by Mr. J. Chamberlain, who described it as a non-party question, but one of grave constitutional importance. "The matter," he said, "arises from a motion which was unanimously adopted by the House . . . 'that Mr. Speaker do issue his warrant to the Clerk of the Crown to make out a new writ for the election of a member to serve in the present parliament in the place of the Hon. B. Coleridge, who since his election has accepted the Chiltern Hundreds.' The resolution was carried; but I want to call attention to what follows from having carried this resolution. It is based on two propositions. The first is that the Hon. B. Coleridge was, up to his acceptance of office (Chiltern Hundreds), a member of this House; otherwise, of course, he could not have vacated his seat by accepting office. The second proposition is that, at the time of accepting office, the Hon. B. Coleridge was not a peer of the realm. He was described as the Hon. B.

(*m*) [*Cf. supra*, pp. 211 *seq.*, where the question of life peerages is more exactly examined.—Ed.]

(*n*) [*Cf.* Hansard's Parl. Debates, vol. xxvi. (1894); and May, Parl. Practice (12th ed. 1917), pp. 39 *seq.*—Ed.]

Coleridge, son of a peer, but *not* a peer. Consequently, by passing this resolution the House has indirectly decided that a man may be a member of parliament and not a peer, although he is the eldest son of a peer, who is deceased. . . . Why is it that the Hon. B. Coleridge was not a peer at the time he accepted the Chiltern Hundreds? It can only be because he had not fulfilled a certain formality—that is, because the writ of summons which calls him to the Upper House had not been issued. But the writ of summons is only issued on the application of the person who succeeds to the peerage, and, consequently, a person who succeeds to any peerage will have it in his power to refrain from applying for a writ of summons, which is as long as he pleases, and during the whole of such time he will be eligible as a member of this House and may sit in this House."

Referring to a dictum of Mr. Speaker Onslow (1727-1754), who declared that "a person becomes a peer by descent the instant the ancestor dies," Mr. Chamberlain stated that it had now probably become the habit of the House of Commons to ask for proof that the person who claimed the peerage was entitled to it, and that the best proof would be a writ of summons. The matter was referred to a select committee, but allowed to drop. But the question is a vital one and awaits decision, in view of the probable reconstitution of the House of Lords.]

Reform of House of Lords.

[Frequent differences touching high political questions, which in recent years culminated in acute tension between the two Houses of the legislature, did not fail in their effect upon the attitude of the Upper House, as to a reform of their body, so as to bring it more into touch with the democratic spirit of the age.

Following on the Appellate Jurisdiction Act of 1887 (*o*), Lord Rosebery, in March, 1888, brought forward a motion for the appointment of a select committee to inquire into the constitution of the House of Lords. Although this motion was lost, it was followed, in the course of the same year, by schemes advanced by both the Earl of Dunraven

(*o*) See *supra*, p. 212.

and the Marquis of Salisbury for the reconstitution and reconstruction of the Upper Chamber (*p*). These proposals were withdrawn.

Next, in the elation of victory at the polls, the radical party in the House of Commons, through their spokesman, Mr. Labouchere (member for Northampton), agitated for a drastic reform of the Upper Chamber, and on March 13, 1894, this member moved an amendment to the address to the throne, which, in its wording, practically proposed the abolition of the House of Lords. The amendment was carried. On the same day, the address, thus amended, was negatived on the proposal of the government, and thus ended a constitutional crisis unparalleled in English constitutional history: "the address to her Majesty being recalled on the motion of those who originally proposed it," to use the words of Mr. Balfour, the leader of the opposition (*q*).

The question of a reform of the House of Lords did not again become acute until 1909, when, the Upper House having rejected the budget, a bill was introduced by the government (the Parliament or Veto bill) curtailing the powers and privileges of the Upper House in certain conditions. This was met by the House of Lords with a counterstroke, Lord Rosebery, on March 9, 1910, giving notice of three resolutions emphasising the need of a strong Second Chamber to be secured by reforming the House of Lords. This was followed later by a bill for the reform of the House of Lords, brought in by Lord Lansdowne, the leader of the conservative party in the Upper House (*r*).

Taking part in elections.

The right of taking part in elections has been declared to have been assured to the peers by the rejection in 1894 of Lord R. Churchill's sessional order in the House of Commons, which declared that "peers should not take part in elections." It would not appear, however, that the neutral position taken up by the House of Commons could even by implication give a right to do that which constitutional practice has never admitted. "It would be difficult to find

(*p*) See L. O. Pike, Const. Hist. of House of Lords, pp. 384-387.

(*q*) *Vide* Sir W. T. Charley, The Crusade against the Constitution (London, 1895).

(*r*) For details as to this see *infra*, pp. 769 *seq.*

a better illustration than is afforded by the House of Lords of the transformations effected by time on the one hand, and of the persistence, on the other hand, with which old names are used to designate changed institutions. Trial by jury, parliament, the House of Lords and the House of Commons have all lost the character which they had when the respective terms were first used to describe them" . . . but "even in its defects, the House of Lords has, since it ceased to be a House of feudal peers, been not an unfaithful mirror of the country" (*s*).]

III. *The House of Commons.*

Like the House of Lords, the House of Commons has also undergone very important changes in its numbers, its composition, and its political influence. In the year 1295, the date of the perfect constitution of the national parliament under Edward I. (*t*), the members of the Lower House numbered 274, comprising 74 knights of the shire, and 200 citizens and burgesses. Under Edward III. and his three immediate successors the number of the burgesses was about 180, fluctuating in different parliaments according to the negligence or partiality of the sheriffs in omitting places which had formerly returned members. New boroughs, however, either on account of their growing importance or to increase the authority of the crown in the Lower House, were from time to time summoned to return representatives, and at the accession of Henry VIII. we find 111 cities and boroughs (all of which retained the privilege down to the Reform Act of 1832) represented in parliament by 224 citizens and burgesses. In this reign the number of members was considerably increased by the addition of representatives for Wales (*u*), and the Tudor sovereigns systematically pursued the policy of creating insignificant boroughs—many of them mere villages—for the express purpose of corruptly supporting the influence

Number of members.

(*s*) [Pike, Const. Hist. House of Lords, pp. 388, 391.]
(*t*) *Supra*, pp. 229-231, 242.
(*u*) *Supra*, p. 363.

of the crown in the House of Commons (*w*). Between the reigns of Henry VIII. and Charles II., no less than 180 members were added to the House by royal charter alone (*x*). The borough of Newark, which received the parliamentary franchise by royal charter under Charles II., was the last instance of its kind. The House of Commons took the issue of writs into its own hands; and no new borough was created in England or Wales until the Reform Act of 1832. At the date of the union with Scotland the number of members was 513. The Act of Union (6 Anne, c. 7) added forty-five representatives of that kingdom; and the Act of Union with Ireland in 1800 (39 & 40 Geo. III. c. 67) made a further addition to the House of 100 Irish members. The proportional representation of the three kingdoms has since been a little varied, Scotland having [, 1890, seventy-two members, and Ireland 103]; but the total number of members has remained nearly the same. In 1879, owing to the disfranchisement of certain boroughs for corrupt practices, it stood at the slightly reduced figure of 650 (*xx*).

Defects of the representative system.

For some time after its establishment, the representative system, though never aiming at theoretical perfection, had been practically efficient. The knights of the shire and the burgesses who sat in the parliaments of the thirteenth and fourteenth centuries really did represent the wishes of

(*w*) *Supra*, p. 346.

(*x*) Glanville's Reports, c. ii.; May, Const. Hist., i. 329. In the reign of James I. the commons, out of favour to popular rights, resolved that every town which had at any time returned members to parliament was entitled to a writ as a matter of course; and by virtue of this resolution fifteen boroughs regained the parliamentary franchise under James I. and Charles I. In 1673 the County Palatine and City of Durham were for the first time admitted to the franchise by Act 25 Car. II. c. 9; and about the same time a royal charter was granted to Newark, enabling it to return two burgesses to parliament. Hallam, Const. Hist., iii. 39.

(*xx*) [The Representation of the People Act, 1884, and the Redistribution of Seats Act, 1885, must be carefully distinguished one from the other; the first introduced service franchise, which extended to householders and lodgers in counties the suffrages which householders and lodgers in the boroughs had enjoyed. It placed the three kingdoms upon equal terms with respect to electoral qualifications. The latter made a new division of the United Kingdom into county and borough constituencies, and raised the number of members of parliament to 670, giving to England six and to Scotland twelve additional representatives. By the Representation of the People Act, 1918, the number of members was further increased to 707. See *infra*, p. 786.—Ed.]

the great majority of the free inhabitants of the counties and boroughs by whom they were elected. But from the end of the fourteenth century to the passing of the Reform Act, early in the second quarter of the nineteenth, the House of Commons, as it gained in numbers, lost more and more in real representative character. The inequalities in the representation which in course of time naturally grew up, through the simultaneous decay of ancient towns and rise into commercial importance of what had been once mere agricultural villages, were allowed to go on unheeded. Many new boroughs were, indeed, as we have seen, enfranchised by royal charter between the reigns of Henry VIII. and Charles II.; but they were for the most part places of no special importance or size, and were, in nearly every instance, endowed with the privilege of returning members to parliament for the express purpose of adding, as nomination boroughs, to the power of the crown in the House of Commons. In 1653, Cromwell made a statesmanlike effort to remedy the evil by disfranchising many small boroughs, giving members to Manchester, Leeds, and Halifax, and increasing the number of county members; but his reforms, though characterised by Clarendon as a "warrantable alteration, and fit to be made in better times," were cancelled at the Restoration; and thenceforth, until the reign of George III., there was no further attempt to check the ever-growing abuses of the representative system. That system had become thoroughly venal and corrupt. Most of the English boroughs—with a suffrage generally restricted to close corporations or to those bodies and their nominees, the freemen (*y*)—might be roughly divided into those which were sold by their "patrons," the great territorial proprietors, and those which sold themselves. Of the remainder, while many were under the influence of the crown, and obediently returned the crown's nominees, others were owned by patrons who exercised their powers of nomination honestly and conscientiously, and did a service to the country by introducing into the House of Commons young men of ability and promise, who, lacking money or connections, could not otherwise have found a seat. But

(*y*) *Supra*, p. 326.

the great majority of the boroughs were venal. Both the crown and the ministers of the day, either acting in unison, or, as was frequently the case under George III., in opposition to one another, bought seats alike of patrons and constituencies—titles, pensions, or hard cash satisfying the varying wants of all. The market for seats was further enlarged and their price enhanced by the competition of rich traders, more especially of the "nabobs," who had returned from the Indies with immense fortunes, and who anxiously sought entrance into the House of Commons as the avenue to social distinction or extended commercial advantage. The published correspondence and memoirs of men of the time attest the wholesale and unblushing bribery and barter of boroughs which prevailed. A few typical instances will serve as illustrations. In 1767, the borough of Ludgershall was sold by its proprietor, George Selwyn, for £9,000 (*z*). In 1807, £10,000 was offered for the two seats of Westbury, but was refused as inadequate by the trustees for the creditor of the late proprietor, Lord Abingdon (*a*). Sales by patrons were generally passed over without animadversion, but some of the attempts of corporations or constituencies to sell the seats at their disposal excited occasional indignation, and received a mild measure of punishment. In 1768, the corporation of Oxford took advantage of the general election to demand of the sitting members, Sir Thomas Stapleton and the Hon. Robert Lee, as the consideration for returning them again, the sum of £5,760, which was required to pay off the municipal debts. The request was not only refused, but reported to the House of Commons, who committed the mayor and ten of the aldermen to Newgate, whence they were soon discharged after a reprimand from the Speaker. But with a sturdy determination to pay the corporation debts out of any other pockets rather than their own, the worthy mayor and aldermen, while still in Newgate, completed a sale of the two seats, already partly negotiated, to the Duke of Marlborough and the Earl of Abingdon; while the town clerk carried off the corporation books so as to prevent any

(*z*) Letters of Lord Chesterfield to his Son, iv. 269.
(*a*) Life of Sir Samuel Romilly, ii. 200.

evidence of the transaction from becoming public (*b*). But perhaps the political morality of the times may be best exemplified by the borough of Sudbury, which without any hesitation or attempt at decent disguise, shamelessly advertised itself for sale to the highest bidder (*c*).

In the larger boroughs and seaports the government not only had recourse to money bribes, but ensured the return of their candidates by the wholesale distribution of appointments in the customs and excise. In 1782, when Lord Rockingham carried a measure for the disfranchisement of revenue officers, no less than 11,500 were found to be electors, and seventy elections were said to depend mainly on their votes (*d*).

The county constituencies of forty-shilling freeholders, although limited and unequal, were less corrupt and more independent than the voters in boroughs; but they were practically at the disposal of the great nobles and local landowners. Their exclusive possession by the territorial aristocracy was further protected by the enormous expense of a contest, which, in one instance, that of Yorkshire, in 1807, amounted to no less a sum than £200,000, as the joint expenses of two rival candidates, Lord Milton and Mr. Lascelles (*e*).

Scottish representation.

The representation of the Scottish counties and boroughs was in even a worse condition than the English. In every borough in Scotland the franchise was vested in a self-elected corporation; while the county franchise belonged exclusively to the owners of feudal "superiorities," of the annual value of £400, who were not necessarily either landowners or residents in their counties. With a population of over 2,000,000, the total number of Scottish county

(*b*) Cobbett's Parl. Hist., xvi. 397-402; Horace Walpole, Memoirs of Geo. III., iii. 153.

(*c*) Horace Walpole, Mem. of the Reign of Geo. III., i. 42.

(*d*) Cobbett's Parl. Hist., xxiii. 101. Lord Rockingham said, in one borough having 500 voters, 120 had been appointed to places under government, through the influence of one of their number who happened to be a friend of the first lord of the treasury. *Ibid.* The electoral disabilities of revenue officers, no longer necessary in the large constituencies created by the Reform Act of 1867, were removed by 31 & 32 Vict. c. 73, and 37 & 38 Vict. c. 22.

(*e*) Life of Wilberforce, iii. 335.

electors in 1823 was under 3,000; one county, Cromarty, having only nine. It was stated by the lord advocate in 1831, that at an election then within living memory, for the county of Bute—which had not more than twenty-one electors, of whom but one was resident—that resident, together with the sheriff and the returning officer, constituted the meeting; and having taken the chair, moved and seconded his own nomination, put the question to the vote, and elected himself (*f*).

Irish representation.

In Ireland, most of the boroughs, from causes similar to those which affected the boroughs of England and Scotland, were equally subject to the patronage of noblemen and landowners. The counties possessed, indeed, a comparatively popular constituency, composed of the forty-shilling freeholders, whose numbers had been multiplied alike by the action of the Irish land laws and of the protestant landowners who favoured sub-division with a view to extending their political influence. But though relatively far more numerous than the English county electors, the Irish peasant proprietors were also far less independent; so that the union with Great Britain in 1801 served only to add to the united parliament a further mass of nominee members (*g*).

In 1793, when the members of the House of Commons numbered 558, a majority of 354 was nominally returned by "less than 15,000 electors," but in reality on the nomination or recommendation of the government and 197 private patrons (*h*). The union with Ireland in 1801 added 100 members to the House, of whom seventy-one were nominated by fifty-six individuals. In 1816, Dr. Oldfield, in his "Representative History," gave elaborate details showing that, of the 658 members, 487 were then returned by the nomination of the government and 267 private patrons, of whom 144 were peers (*i*). Well might the younger Pitt exclaim: "This House is not the representative of the people of Great Britain; it is the representative

(*f*) Hansard, vii. 529; May, Const. Hist., i. 303.
(*g*) Wakefield, Statistical and Political Account of Ireland, ii. 299; Oldfield, Representative Hist., vi. 209 *seq.*; May, Const. Hist., i. 359.
(*h*) Annual Register for 1793, App. to Chronicle, pp. 83-99.
(*i*) Oldfield's Representative Hist., vi. 285-300.

of nominal boroughs, of ruined and exterminated towns, of noble families, of wealthy individuals, of foreign potentates."

Bribery of members.

A House of Commons thus tainted at its source was peculiarly open to the attacks of political corruption. George III. personally examined the voting list, and awarded honours, places, and pensions, or took means to signify his displeasure, in accordance with the votes of individual members. The great number of valuable appointments tenable by members of parliament operated like prizes in a lottery. "An interested man," said Lord Rockingham, "purchases a seat upon the same principle as a person buys a lottery-ticket" (*k*). But direct gifts of money to members were also freely resorted to by the ministers. Commenced under Charles II., and continued under William III., this method of "managing the House of Commons" was reduced to a system during the long tenure of office by Sir Robert Walpole. It continued to flourish during the remainder of George II.'s reign, and under George III. was not only adopted and expanded by Lord Bute, but received a new and most pernicious development in the form of issuing public loans and lotteries on extravagantly easy terms, and rewarding the supporters of the government by a distribution of the shares, which they were able to sell at once at a high premium (*l*). In order to carry the preliminaries of the Peace of Paris in December, 1762, an office was publicly opened at the treasury for the bribery of members, and the sum of £25,000 was afterwards stated by the secretary of the treasury to have been expended in a single day in bribes, descending so low as a £200 bank-bill (*m*).

(*k*) Earl of Albemarle's Rockingham Memoirs, ii. 399.

(*l*) Cobbett's Parl. Hist., xv. 1305; Lord Mahon, Hist. of Eng., v. 20; Lecky, Hist. of Eng., i. 368.

(*m*) Horace Walpole, Memoirs of Geo. III., i. 199. The following remarkable letter from Lord Saye and Sele to Mr. G. Grenville shows that even to members of the House of Lords money bribes were offered by ministers without any sense, on either side, of dishonour or insult:

"London, November 26, 1763.

"Honoured Sir,—I am very much obliged to you for that freedom of converse you this morning indulged me in, which I prize more than the lucrative advantage I then received. To show the sincerity of my words (pardon, Sir, the perhaps over niceness of my disposition) I return enclosed

Parliamentary reform advocated by Lord Chatham in 1766.

The glaring defects of the representative system—the decayed and rotten boroughs the private property of noblemen, the close corporations openly selling the seats at their disposal to members who in turn sold their own parliamentary votes, and the existence of great manufacturing cities distinguished by their wealth, industry, and intelligence, and yet possessing no right of sending representatives to parliament—led Lord Chatham (then Mr. Pitt) as early as 1766 to advocate parliamentary reform. "Before the end of this century," he remarked to the Earl of Buchan, "either the parliament will reform itself from within, or be reformed with a vengeance from without." In the House he denounced the borough representation as "the rotten part of our constitution. It cannot continue the century; if it does not drop, it must be amputated" (*n*).

Wilkes' scheme of reform, 1776.

Ten years later, in 1776, the notorious John Wilkes introduced a comprehensive scheme of reform in a bill proposing to give additional members to the metropolis and to Middlesex, Yorkshire, and other large counties; to disfranchise the rotten boroughs and add the electors to the county constituency; and lastly, to enfranchise Manchester, Leeds, Sheffield, Birmingham, and "other rich populous trading towns." "His scheme, indeed," remarks Sir Erskine May, "comprised all the leading principles of parliamentary reform which were advocated for the next fifty years without success, and have been sanctioned within our own time" (*o*). After some further abortive attempts at reform —of which the most noteworthy, on account of its extreme radicalism, was that of the Duke of Richmond, who in 1780 introduced a bill to establish annual parliaments, universal suffrage, and equal electoral districts—the subject was taken up by the younger Pitt in 1782 and 1783. On May 7, 1782, when chancellor of the exchequer in Lord

Pitt's advocacy of reform, 1782-85.

the bill for £300 you favoured me with, as good manners would not permit my refusal of it, when tendered by you. Your much obliged and most obedient servant, "SAYE AND SELE.

"P. As a free horse wants no spur, so I stand in need of no inducement or douceur to lend my small assistance to the king or his friends in the present Administration." Grenville Correspondence, iii. 145-146, *n*.

(*n*) Debates on the Address, Jan. 1766; Cobbett's Parl. Hist., xvi. 100; xvii. 223.

(*o*) May, Const. Hist., i. 394.

Rockingham's administration, Pitt moved for the appointment of a committee to inquire into the state of the representation. But the motion was rejected by 161 votes to 141. Exactly a year later, on May 7, 1783, being then in opposition to the coalition ministry, he submitted three resolutions affirming (1) the necessity of preventing bribery and expense at elections; (2) the expediency of disfranchising any borough whenever the majority of its voters should be convicted of corruption, and of transferring the unbribed minority to the county constituency: and (3) the desirability of increasing the number of county and metropolitan members. These resolutions were, however, negatived by 293 votes to 149 (*p*). Two years later, when prime minister, Pitt again brought forward the question, this time by moving, on April 18, 1785, for leave to introduce a bill "to amend the representation of the people of England in parliament." He proposed the disfranchisement of thirty-six decayed boroughs, and the transfer of their seventy-two members to the counties and the [capital]—the county constituencies being at the same time enlarged by the admission of copyholders. The seats of four other small boroughs were to be obtained by purchase and bestowed upon populous towns: while ten close corporations were to be similarly induced to surrender their exclusive rights for the benefit of their fellow townsmen. The bill was, however, purely permissive in character. No boroughs were to be disfranchised unless with the consent of the proprietors: and as compensation to them the sum of £1,000,000 was to be immediately set aside to accumulate at compound interest until it should become an irresistible bait (*q*). This extraordinary proposal, which would have committed the state to the recognition of a saleable property in borough constituencies, was admitted by its author to be "a tender part," yet, in his opinion, "a necessary evil, if any reform was to take place." But the time was not yet ripe for parliamentary reform. The House of Commons being indifferent to it, the public generally

(*p*) Annual Reg., 1782, Hist., p. 181; 1783, Hist., p. 176.

(*q*) Annual Reg., 1784-1785, p. 189, and Spencer Walpole, Hist. of Eng., ii. 263.

apathetic, and George III. distinctly adverse (*r*), Pitt's Reform Bill was negatived by a majority of seventy-four. The matter was now allowed to drop, and the terror caused by the outbreak of the French Revolution some years later rendered all efforts at reform fruitless.

The question revived after the Peace of 1815.

After the conclusion of the war in 1815 the question of reform was revived. Thenceforward it was again and again brought before parliament by Sir Francis Burdett, Lord John Russell, and others, until at length, under the whig ministry of Lord Grey (who had advocated the cause of reform for forty years), the Reform bill, after defeats in both Houses of Parliament, a dissolution, the resignation and recall of the ministry, and threatened creation of peers by the king (*s*), was passed amidst the greatest popular excitement, and became an Act on June 7, 1832.

The Reform Act, 1832.

By this statute —"the Great Charter of 1832," as it has been deservedly called—fifty-six nomination or rotten boroughs with less than 2,000 inhabitants, and returning 111 members, were swept away (*t*). Thirty boroughs, having less than 4,000 inhabitants, lost each a member, and two more were taken from Weymouth and Melcombe Regis. In this way 143 seats were obtained for distribution among the towns and counties requiring additional representation. Forty-three new boroughs were created, twenty-two of which, including metropolitan districts, received the privilege of returning two members, and twenty-one one member each. The number of county members for England and Wales was increased from ninety-five to 159, the larger counties being divided, and a third member being assigned to other important county constituencies. All narrow rights of election were set aside in boroughs, and a £10 householder qualification (subject to conditions as to residence and payment of rates) was established instead, while

(*r*) Pitt having written to the king insinuating a fear lest the personal influence of the crown should be employed to defeat the measure, George replied that "out of personal regard," he would "avoid giving any opinion to any one on the opening of the door to parliamentary reform, except to him"; but that he had "ever thought it unfortunate that he [Pitt] had early engaged himself in this measure." Tomline, Life of Pitt (4th ed.), ii. 40.

(*s*) *Supra*, pp. 708, 709.

(*t*) [*Cf.* pp. 714 *seq.*, *supra*.—Ed.]

the county franchise was extended by the addition to the old forty-shilling freeholders of copyholders and leaseholders for terms of years, and of tenants-at-will paying a rent of £50 a year (*u*).

Scottish Reform Act, 1832.

In the same session Reform Acts were passed for Scotland and Ireland. The number of Scottish representatives, fixed by the Act of Union at forty-five, was increased to fifty-three, of whom thirty were assigned to counties and twenty-three to cities and burghs. The county franchise was extended to all owners of "lands, houses, feu duties, or other heritable subjects," of the yearly value of £10, and to certain classes of leaseholders, and the burgh franchise to all £10 householders (*w*).

Irish Reform Act, 1832.

In Ireland several rotten boroughs had been disfranchised at the time of the union: the right of election was now taken away from borough corporations, and vested in £10 householders. The qualification for the county franchise had been raised from 40s. to £10 freeholds by a measure (*x*) passed at the same time as the Roman Catholic Emancipation Act in 1829, and intended as a protection against the influence of the Roman catholic priests and agitators, who had ousted the protestant landlords of their political influence over the poorer freeholders. By the present Act large additions were made to the county constituencies by the inclusion of certain classes of leaseholders and of £10 copyholders. The number of Irish representatives, fixed by the Act of Union at 100, was increased to 105 (*y*).

The Reform Act, 1867.

By the Reform Act of 1867 -passed by Lord Derby's conservative ministry with the aid of the liberal majority in the House of Commons -a further extension of the electoral franchise in England and Wales was introduced scarcely less important than that conceded by the Reform Act of 1832.

The borough franchise was extended to all householders

(*u*) 2 & 3 Will. IV. c. 45.

(*w*) *Ibid.* c. 65.

(*x*) 10 Geo. IV. c. 8. Repealed by Statute Law Revision Act, 1873.

(*y*) 2 & 3 Will. IV. c. 88. In 1850 the Irish borough franchise was extended to householders rated at £8, and the qualification required for the county franchise was also lowered, so as to include the owners of freeholds rated at £5 and occupiers rated at £12 (13 & 14 Vict. c. 69).

(subject to one year's residence and payment of poor rates) as well as to lodgers occupying lodgings of the annual value of £10 (*z*). The county occupation franchise was reduced to £12; and thirty-three seats were withdrawn from English boroughs, twenty-five of which were transferred to English counties, and the remaining eight to Scotland and Ireland (*a*).

Scottish and Irish Reform Acts, 1868.

In the following year Reform Acts were passed for Scotland and Ireland, similar to the English Act in principle, but differing from it in many of their details. In the Scottish counties the ownership franchise was reduced to "lands and heritages" of the yearly value of £5; and a £14 occupation franchise established. The Scottish boroughs received a household and a lodger franchise. In Ireland no change was made in the county constituencies, but the borough franchise was further reduced to a £4 rating occupation (31 & 32 Vict. c. 48; 31 & 32 Vict. c. 49) (*b*).

Representation of minorities.

By the Reform Act of 1867 a perfectly new principle, that of the representation of minorities, was introduced, in a tentative and partial manner, into the representative system. This principle had been embodied in

(*z*) *Supra*, p. 329, *n.* (*r*).

(*a*) 30 & 31 Vict. c. 102.

(*b*) [The following tabular statement, compiled from the Parliamentary Return issued in 1910, shows the total number of electors then on the Parliamentary Register in the United Kingdom.

ELECTORS OF THE UNITED KINGDOM.

	Electors.	Population.
England } Wales }	6,221,722	36,169,150
Scotland	785,208	4,929,251
Ireland	698,787	4,371,163
Total	7,705,717	45,469,564

In 1868, prior to the operation of the Reform Acts of 1867-1868, the total number of electors, in boroughs and counties, of the United Kingdom, did not exceed 1,370,793.

After the General Election of December 1910, the House of Commons

Lord John Russell's abortive Reform bill of 1854, which proposed to assign three members to certain counties, and other large places, the electors of which were to be entitled to vote for two only out of the three. The city of Manchester, and the boroughs of Liverpool, Birmingham, and Leeds, were now each empowered to return three members to parliament: and it was declared (sections 8, 9) that at a contested election for any county or borough represented by three members, no person should vote for more than two candidates, nor in the city of London, which had four members, for more than three candidates.

[Before the Act of 1867 was passed the problem of "proportional representation" was ably discussed by Hare in his *Treatise on the Election of Representatives* (1859), and by Mill in his *Representative Government*. The latter observed in regard to this principle: "The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens: the latter, strangely confounded with it, is a government of privilege in favour of the numerical majority, who alone possess practically any voice in the state. . . . In a really equal democracy every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the repre-

consisted of 670 members, returned as follows by the four divisions of the United Kingdom:

England (465 seats).
London, 62.
Boroughs, 164.
Counties, 234.
Universities, 5.

Scotland (72 seats).
Boroughs, 31.
Counties, 39.
Universities, 2.

Wales (30 seats).
Boroughs, 11.
Counties, 19.

Ireland (103 seats).
Boroughs, 16.
Counties, 85.
Universities, 2.

While the total number of electors in the United Kingdom had in 1910 risen to 7,705,717, with a population of 45,469,564.

For the most recent change, see *infra*, pp. 786 *seq.*—Ed.]

sentatives; but a minority of the electors would always have a minority of the representatives "] (*bb*).

Suppression of bribery and intimidation at elections.

Since the Reform Act of 1832 the attention of parliament has been continually directed to the suppression of bribery and intimidation at elections. The measures for this purpose culminated in 1872 in the passing of an experimental Ballot Act (to continue in force till December 31, 1880), by which the open nomination of candidates on the hustings was abolished, and voting by secret ballot at both parliamentary and municipal elections was substituted for the old English system of open voting (*c*).

Summons, duration, and intermission of parliament.

The duration and intermission of parliament have been the subject of important legislative enactments in the period since the Revolution. By the ancient legal doctrine of the constitution, parliament can only be summoned by the king's writ; when summoned its duration was formerly limited by the king's pleasure alone; and on the death of the king who summoned it, it was held to be *ipso facto* dissolved. The parliament which deposed Richard II. in 1399 was held, by a logical deduction of the constitutional lawyers of that day, to have ceased to exist when Richard ceased to be king; but as it was not convenient for Henry IV. to summon a new parliament, an expedient was devised by which, under a transparent legal fiction, the same members who had deposed Richard were assembled again in parliament under Henry's writs.

The Parliament of 1399.

Convention Parliament of 1660.

Nearly three centuries later the Convention Parliament which restored Charles II. was looked on as of doubtful validity because not summoned by the king's writ. The Convention acted indeed as a parliament, and even passed an Act declaring itself to be "the two Houses of Parliament, notwithstanding the want of the king's writ of summons, and as if his majesty had been present in person at the commencement thereof" (*d*): but it was deemed needful, or at all events prudent, that all its Acts should be confirmed by the succeeding parliament summoned in due form. At the Revolution of 1688 legal subtleties,

(*bb*) [See *infra*, p. 787, for the recent change.—Ed.]
(*c*) 35 & 36 Vict. c. 33. The universities were excepted.
(*d*) 12 Car. II. c. 1.

though still potent, were treated with greater boldness and common sense. The Convention Parliament which deposed James II. (*c*) and elected William and Mary, passed an Act indeed, like the Convention of 1660, declaring itself to be a legal parliament, notwithstanding any defect of form in its summons or otherwise (*f*); but it was no longer thought necessary that its Acts should be confirmed by another parliament (*g*). Convention Parliament in 1688.

We have seen how the king's prerogative of calling parliament had been limited under Edward II. and Edward III. by statutes requiring annual sessions (*gg*), and under Charles I. by the Triennial Act, passed by the Long Parliament in 1641 (*h*). After the Restoration this Act was repealed, in 1664, by the "Pensionary Parliament" of Charles II. (which was prolonged for nearly eighteen years), but it was at the same time provided by the repealing statute "that parliament should not be interrupted above three years at the most" (*i*); and the Bill of Rights declared in October 1689, that "parliament ought to be held frequently" (*k*). Only two months later, in December 1689, a bill for establishing triennial parliaments was introduced in the House of Lords. Dropped at the prorogation, it was reintroduced in 1693, and passed both Houses; but William refused his assent. The commons, however, persevered with the project; and a similar bill, in the following year, became the Triennial Act of William and Mary, in November 1694. It provided that a new parliament should be called within three years after the dissolution of a former one, and the utmost extent of time that any parliament should be allowed to sit was limited to three years (*l*). This continued to be the law Triennial Act, 1641. Triennial Act, 1694.

(*e*) *Supra*, p. 618.

(*f*) 1 Will. & Mary, sess. 1, c. 1.

(*g*) "Each of these differences [in the proceedings of 1399, 1660, and 1688] marks a stage in the return to the common-sense doctrine, that, convenient as it is in all ordinary times that parliament should be summoned by the writ of the sovereign, yet it is not from that summons, but from the choice of the people, that parliament derives its real being, and its inherent powers." Freeman, Growth of Eng. Const., p. 131

(*gg*) [*Supra*, pp. 248, 250.]

(*h*) *Supra*, pp. 556 *seq.*

(*i*) 16 Car. II. c. 1.

(*k*) *Supra*, p. 627.

(*l*) 6 Will. & Mary, c. 2.

for two-and-twenty years. But after the suppression of the Rebellion in 1715, the whig ministry of George I., still apprehensive of the machinations of the Jacobites, and fearful lest a general election should endanger the stability of the new dynasty, introduced and carried the Septennial Act of 1716, which extended the period of parliamentary duration to seven years (*m*). It is remarkable that the bill, although specially affecting the constitution of the Commons' House, was introduced in the House of Lords, its proposer being William, second Duke of Devonshire, whose father had been one of the chief promoters of the Triennial Act of 1694. By passing the bill without a dissolution, parliament not only provided for the future, but extended the duration of the existing House of Commons for four years beyond the time for which it had been elected. Such a proceeding, though perfectly legal - for to the authority of parliament there is no limit—had its best justification in the real and pressing danger which then menaced the reigning family. The special emergency might indeed have been met by a temporary measure; but a permanent Act was deemed the safer and more constitutional course (*n*). Moreover, there was much to be urged in favour of a change. "Ever since the Triennial Bill has been enacted," said Sir Richard Steele, who supported the septennial measure in the House of Commons, "the nation has been in a series of contentions; the first year of a triennial parliament has been spent in vindictive decisions and animosities about the late elections; the second session had entered into business; the third session has languished in the pursuit of what little was intended to be done in the second; and the approach of an ensuing election has terrified the members into a servile management, according as their respective principals were disposed towards the question before them in the House." Although the bill was strongly opposed by the tories in both Houses, it passed its third reading in the commons with a dissentient minority of only 121. Among the most important effects of the extension of the natural duration

Septennial Act, 1716.

(*m*) 1 Geo. I. c. 38.
(*n*) Lord Mahon, Hist. of Eng., i. 301.

of parliaments was a marked increase in the stability and power of the House of Commons, and a strengthening of the influence of the ministry. Mr. Speaker Onslow declared that the Septennial Act formed "the era of the emancipation of the British House of Commons from its former dependence on the crown and the House of Lords" (*o*). The difference between the position of the Lower House under the triennial and septennial systems is, indeed, strongly brought out by the fact that in the reign of Anne party leaders, like Harley and St. John, joined the ranks of the peerage in the very midst of their political careers, while under the septennial system Sir Robert Walpole designedly confined himself to the House of Commons, and only accepted an earldom from George II. when defeat had closed his long administration.

Attempts to repeal the Septennial Act.

From the reign of George II. down to the reign of Victoria, various attempts have been made at different time to repeal the Septennial Act, and shorten the duration of parliaments. The great Earl of Chatham, in 1771, "with the most deliberate and solemn conviction, declared himself a convert to triennial parliaments" (*p*). And so recently as 1849, Mr. Tennyson D'Eyncourt obtained leave to introduce a Triennial bill by a majority of five. But more recently, as the operation of an extended suffrage has brought the House of Commons into closer and more sympathetic relations with the mass of the people, the popularity of this question has sensibly declined (*q*). There is no principle involved in either of the numbers 3 or 7. Any restriction on the duration of parliaments is but a means to an end - the maintenance of a House of

(*o*) Coxe's Life of Sir Robert Walpole, i. 75.

(*p*) Cobbett's Parl. Hist., xvii. 223.

(*q*) "It is a remarkable illustration of the changes that may pass over party warfare, that the republican Milton at one time advocated the appointment of members for life [in his 'Ready and Easy Way to Establish a Commonwealth']; that the tory party under Walpole and Pelham advocated triennial, and even annual parliaments, which afterwards became the watchwords of the most extreme radicals; that the whigs, taking their stand upon the Septennial Act, contended against the tories for the greater duration of parliament; and that a reform which was demanded as of capital importance by the tories under George I. and George II., and by the radicals in the succeeding reigns, has at present scarcely a champion in England." Lecky, Hist. of Eng. i. 450.

Commons fairly representing the wishes of the nation, as those wishes periodically change amidst the vicissitudes of home and foreign politics. In practice it is found that no parliament is continued longer than six years (*r*); and indeed, whatever be the legal limit fixed, the practical limit will necessarily be somewhat less, in order that the government may retain its freedom of dissolving parliament untrammelled, and that the inconvenience of a forced dissolution at an untoward moment may be avoided. Should the question be again taken up in earnest, a quinquennial or sextennial limit would probably, on the ground of convenience and efficiency, be found preferable alike to the somewhat excessive prolongation possible under the existing system, and to the inadequacy of the shorter period which it replaced (*s*).

Abrogation of old rule that parliament was dissolved by death of the sovereign.

The rule that parliament was *ipso facto* dissolved by the death of the sovereign was abrogated in Queen Anne's reign by an enactment that the parliament in being at the time of a demise of the crown should continue for six months afterwards, unless specially prorogued or dissolved by the new sovereign (*t*). A statute of George III.'s reign further provides, that if the sovereign should die in the interval between the dissolution of one parliament and the meeting of a new one, the last preceding parliament shall *ipso facto* revive and continue in being, unless again dissolved for six months (*u*). The six months' limit imposed by the Act of Anne was abolished by a clause in the Reform Act of 1867, so that now the continuance of a parliament in being at a demise of the crown is in no way affected by that event (*w*).

(*r*) Frequent dissolutions have reduced parliaments, at several periods, to an average duration of three or four years. Sir Samuel Romilly stated, in 1818, that out of eleven parliaments of George III. eight had lasted six years. But from the accession of William IV. in 1830 to the year 1860, there were no less than ten parliaments, showing an average duration of three years only. (May, Const. Hist. i. 444.) The parliament which met on May 31, 1859, was not dissolved till July 6, 1865, exceeding the six years' practical limit by thirty-six days.

(*s*) [A quinquennial limit has been fixed under sec. 4, sub-sec. 7 of the Parliament Act (1911); see *infra*, p. 776.—Ed.]

(*t*) 7 & 8 Will. III. c. 15; 6 Anne, c. 7.

(*u*) 37 Geo. III. c. 127.

(*w*) 30 & 31 Vict. c. 102, s. 51.

Prior to the Revolution, privilege of parliament had been nearly always asserted on behalf of popular rights and liberties against the arbitrary authority of the crown (*x*). The Revolution established the supremacy of parliament in the government of the country: but by the time that the House of Commons had become all-powerful in the state it was ceasing, as we have seen, to be a real and effective representative of the commons of England. Corrupt in itself, and the offspring of narrow and corrupt constituencies, its necessary power of inflicting punishment for breach of privilege was placed at the disposal of the executive for the suppression of popular liberty.

Privilege of parliament since the Revolution.

In 1714, Sir Richard Steele was expelled the House for writing "a seditious and scandalous libel" called *The Crisis*, a pamphlet reflecting on the tory ministry of Queen Anne as inimical to the Hanoverian succession. In their proceedings against Wilkes in 1763 and following years, the commons first withdrew the shield of privilege in order to justify a judicial decision contrary to law and usage, and then, not content with expelling the obnoxious member, proceeded illegally to deprive the electors of Middlesex of their free choice of a representative. Wilkes had been arrested and imprisoned, in consequence of the publication of the celebrated No. 45 of the *North Briton*, on a "general warrant"—*i.e.*, a warrant not specifying any person by name, but directed against "the authors, printers, and publishers generally"—signed by Lord Halifax, secretary of state. Released on a writ of habeas corpus, on the ground of his privilege as a member of the House of Commons, the Lower House, eager to second the vengeance of the king, voted the publication, while still the subject of a prosecution in the King's Bench (which Wilkes declared himself ready to meet notwithstanding his privilege), "a false, scandalous, and seditious libel, tending to excite traitorous insurrections," and resolved "that privilege of parliament does not extend to the case of writing and publishing seditious libels" (*y*). Wilkes, having been proved to be the author and publisher of the obnoxious No. 45, was expelled the House, and withdrew

Expulsion of members.

Proceedings against Wilkes, 1763.

(*x*) *Supra*, pp. 299 *seq.*
(*y*) Cobbett's Parl. Hist., xv. 1359 *seq.*

to France, an exile and an outlaw. Returned for Middlesex in 1768, he was again expelled (*z*); and on his immediate re-election, the House not only expelled him a third time, but resolved that his expulsion rendered him "incapable of being elected a member to serve in this present parliament." Again re-elected by the county of Middlesex, the House declared his return to be null and void; and, on his being once more returned by the county, the House not only declared his election void but adjudged the seat to Colonel Luttrell, the second candidate, who had received only 296 votes, against 1,143 recorded for Wilkes. A profligate demagogue was thus turned into a popular hero and a champion of constitutional freedom. After a lapse of five years parliament was dissolved, and to the new parliament in 1774 Wilkes was again returned for Middlesex. The former intemperate proceedings respecting the Middlesex election, which Lord Camden said had "given the constitution a more dangerous wound than any which were given during the twelve years' absence of parliament in the reign of Charles I.," were at length, in 1782, expunged from the journals of the commons, as being subversive of the rights of the whole body of electors in the kingdom.

The right of the commons (*zz*) to expel a member is undoubted; but since the reversal in 1782 of the proceedings against Wilkes, it has been equally undoubted that expulsion, though it vacates the seat of the expelled member, does not create any disability in him to serve again in parliament. In fact, "the commons have no control over the eligibility of candidates, except in the administration of the laws which define their qualification," for one House of Parliament cannot create a disability unknown to the law (*a*). The question of the disability arising from conviction of treason or felony has been the subject of

Disability arising from conviction of treason or felony.

(*z*) On April 25, 1768, we find George III. writing to Lord North, then chancellor of the exchequer: "Though entirely relying on your attachment to my person as well as on your hatred of any lawless proceeding, yet I think it highly expedient to apprise you that the expulsion of Mr. Wilkes appears to be highly expedient, and must be effected." Lord Mahon, Hist. of Eng., v. 227.

(*zz*) [This paragraph was in a footnote in the preceding edition.]

(*a*) May, Parl. Practice (12th ed., 1917), p. 59.

discussion in the commons on two or three recent occasions. By the common law a person *attainted* of treason or felony was incapable of being elected a member of parliament (*b*). But a doubt was at one time entertained whether a person who was not attainted for treason or felony, but was merely convicted, was disqualified. In 1849, a resolution was brought before the House of Commons that Mr. Smith O'Brien, M.P., having been convicted of treason, was ineligible to sit in the House. It was proposed as an amendment that the resolution should run that he was attainted, but the amendment was rejected, and the resolution carried was, that having been *adjudged guilty* of treason, he was ineligible to sit in the House. The next case was that of O'Donovan Rossa, in 1870, who was returned for Tipperary, while undergoing sentence of penal servitude for treason-felony. As he had been convicted and sentenced under the Treason-Felony Act, 11 & 12 Vict. c. 12 (*c*), it was contended that, not being attainted, there was no disqualification; but the House again rejected the contention, and resolved that O'Donovan Rossa "having been *adjudged guilty* of felony, and sentenced to penal servitude for life, and being now imprisoned under such sentence, has become, and continues, incapable of being elected or returned as a member of this House." In order, however, to obviate any doubts as to the legality of this determination, a provision was inserted in the Act which abolished forfeiture and attainder for treason or felony (33 & 34 Vict. c. 23, passed in the same year 1870) that any person thereafter convicted of those offences should be incapable, while undergoing punishment, of being elected a member of, or sitting or voting in, parliament, or of exercising any parliamentary or municipal franchise. The proceedings in O'Donovan Rossa's case also established that the House, notwithstanding the Act of 1868 (31 & 32 Vict. c. 125) (*d*), reserved in its own hands the power to decide on the eligibility of members. The next leading case is that of Mr. John Mitchell. In 1848 he was tried for treason-felony, found guilty, and sentenced to fourteen years' transportation. After a comparatively

(*b*) Coke, 4th Inst. 47.

(*c*) *Supra*, p. 381.

(*d*) *Supra*, p. 320.

short period he escaped from his imprisonment, and after remaining abroad for many years returned to Ireland in 1874, without having suffered his sentence or received a pardon. In February 1875, he was returned unopposed for Tipperary. On February 18, on the motion of the premier, Mr. Disraeli, and notwithstanding the expression of several doubts as to the legality of the course proposed to be adopted, the House resolved: "That John Mitchell, returned as a member for the county of Tipperary, having been adjudged guilty of felony and sentenced to transportation for fourteen years, and not having endured the punishment to which he was adjudged for such felony, or received a pardon under the great seal, has become, and continues, incapable of being elected or returned as a member of this House."

Abuse of the privilege of commitment.

In the exercise of its powers of commitment the House of Commons, on more than one occasion since the Revolution, has been carried by passion beyond the reasonable and customary limits of privilege. In 1721 a printer named Mist was committed to Newgate by the House for printing a Jacobite newspaper which the commons resolved to be "a false, malicious, scandalous, infamous, and traitorous libel." As the offence of Mist could not possibly be interpreted as a contempt of the House, or a breach of its privileges, this proceeding of the commons was quite as unjustifiable, if not quite so violent, as their treatment of Floyd in the reign of James I. (*e*). The more recent practice of the House of Commons has been to avoid such excesses of jurisdiction by directing a prosecution by the attorney-general for offences of a public nature which have been brought to their notice.

Case of Mr. Alex. Murray, 1751.

The right of the commons to commit for breach of privilege was distinctly recognised by the judges in the two celebrated cases of the Hon. Alexander Murray (brother to Lord Elibank, a noted Scottish Jacobite), in 1751, and of Sir Francis Burdett in 1810. In the course of an inquiry before the House into a contested Westminster election, the high bailiff complained of Mr. Murray (who had been actively engaged in the election

(*e*) *Supra*, pp. 505 *seq.*

against the ministerial candidate) for obstructing and insulting him in the discharge of his duty. The commons decided to hear the parties by counsel, and after ordering Murray to give bail for his appearance from time to time, finally resolved that he should be committed to Newgate, and should receive his sentence on his knees. This humiliating command he steadily refused to obey. "Sir, I never kneel but to God," was his haughty reply to the Speaker (*f*): and the commons were obliged to content themselves with ordering that he should be kept under the closest restrictions in Newgate, without pen, ink, or paper, and that no person, not even his servant, should be admitted to him—a severity which, on account of his ill-health, was soon afterwards relaxed (*g*). On suing out his writ of habeas corpus in the King's Bench, the judges unanimously refused to discharge him, on the ground of their want of jurisdiction to judge of the privileges of the House of Commons or of contempts against them (*h*). As the authority of the House to commit extends only to the duration of the session of parliament, Murray soon obtained his liberty, amidst the plaudits of the people, who regarded him as a martyr in the cause of popular freedom. On the first day of the following session, a motion was carried for his re-committal: but it was then found that he had withdrawn beyond sea, out of reach of the serjeant-at-arms (*i*).

Case of Sir Francis Burdett, 1810.

In 1810, the commons having committed to Newgate the publisher of an offensive placard announcing for discussion in a debating society the conduct of two members of parliament, Sir Francis Burdett denied the authority of the commons, in his place in parliament, and enforced his denial in a published address to his constituents. He was himself adjudged by the House guilty of contempt, and

(*f*) Lord Orford, Memoirs of last Ten Years of the Reign of George II., i. 24.

(*g*) By a standing order of the commons, in 1772, the offensive custom of requiring prisoners to kneel at the bar of the House was renounced. The lords, though silently discontinuing the practice, still affected to maintain it, in cases of privilege, by continuing the accustomed entries in their journals. —May, Const. Hist., ii. 75.

(*h*) State Trials, viii. 30.

(*i*) Lord Mahon, Hist. of Eng., iv. 29

committed to the Tower by the warrant of the Speaker, but not until the aid of the military had been called in to overcome his forcible resistance. He then brought actions for redress against the Speaker and the serjeant-at-arms. The commons, instead of treating these actions as a contempt of their authority, wisely directed the Speaker to plead and submit himself to the jurisdiction of the court. In the result the court of King's Bench, and, on appeal, the Exchequer Chamber and the House of Lords, successively upheld the authority of the House (*k*).

Publication of debates.

Of all the privileges of parliament, the one which has undergone the greatest modification, and of which the practical abandonment has produced the most momentous political results, is that which concerns the secrecy of its proceedings.

The original motive for secrecy of debate was the anxiety of the members to protect themselves against the action of the sovereign, but it was soon found equally convenient as a veil to hide their proceedings from the constituencies. "To print or publish the speeches of gentlemen in this House," said Mr. Pulteney in 1738, "looks very like making them accountable without doors for what they say within" (*l*); and it was only after a prolonged struggle that the right of the electors, and of the public at large, to know what the representatives of the nation were doing in parliament was at length virtually conceded.

The Long Parliament, in 1641, had permitted the publication of its proceedings in the "Diurnal Occurrences of Parliament" (which continued until the Restoration), but prohibited the printing of speeches without leave of the House. For printing a collection of his own speeches, without such leave, Sir E. Dering was expelled the House and imprisoned in the Tower, and his book was ordered to be burned by the common hangman (*m*). The prohibition was continued after the Restoration; but in 1680,

Votes and proceedings ordered to be printed, 1680.

(*k*) [*Burdett* v. *Abbot* (1811), 14 East, 1; 4 Taunt. 401;] Ann. Register for 1810, p. 344; Hansard, Deb. xv. 257, 454; and May, Const. Hist., ii. 76.

(*l*) Cobbett's Parl. Hist., x. 806.

(*m*) Comm. Journ., ii. 411 (Feb. 2, 1641).

to prevent inaccurate accounts of the business done, the commons directed their "votes and proceedings," without any reference to the debates, to be printed under the direction of the Speaker (*n*). Thenceforward till the Revolution, we are almost entirely indebted for our knowledge of the parliamentary debates to the private memoranda and letters of members, which have since been published. Andrew Marvell, member for Hull, sent regular reports to his constituents during the eighteen years from the Restoration to 1678. Anchitell Grey, who represented Derby for thirty years, took notes of the debates from 1667 to 1694, which were published, nearly a hundred years afterwards, in 1769. Locke, indeed, at the instigation of Shaftesbury, ventured, in 1675, to write and publish a report of a debate in the House of Lords, under the title of "A Letter from a Person of Quality to a Friend in the Country"; but the Privy Council ordered it to be burnt by the hangman.

Debates published anonymously.

Debates were also frequently published anonymously in news-letters and pamphlets. After the Revolution frequent resolutions were passed by both Houses, from 1694 to 1698, to restrain "news-letter writers" from "intermeddling with their debates or other proceedings," or "giving any account or minute of the debates." But notwithstanding these resolutions, and the punishment of offenders, privilege was unable to prevail against the craving for political news natural to a free country; and from the accession of the House of Hanover imperfect reports of the more important discussions began to be published in Boyer's "Political State of Great Britain," the *London Magazine*, and the *Gentleman's Magazine*, under the title of the "Senate of Great Lilliput," or the "Political Club," and with either simple initials, or feigned names for the speakers. The difficulties of reporting when notes had to be taken by stealth and the memory was mainly trusted to, naturally led to misrepresentation. Dr. Johnson, who wrote the parliamentary reports in the *Gentleman's Magazine* from November 1740 to February 1743, is said to have confessed that "he

(*n*) *Ibid.* ix. 74.

took care that the whig dogs should not have the best of it" (*o*).

Complaints of unfairness.

In a debate on the subject in 1738, initiated by Mr. Speaker Onslow, Sir Robert Walpole humorously complained of the misrepresentation to which members were subjected. "I have read some debates of this House," he said, "in which I have been made to speak the very reverse of what I meant. I have read others of them wherein all the wit, the learning and the argument has been thrown into one side, and on the other nothing but what was low, mean, and ridiculous; and yet, when it comes to the question, the division has gone against the side which upon the face of the debate had reason and justice to support it" (*p*). Later reporters, moreover, too often indulged in offensive and scurrilous nicknames.

Contest with the printers, 1771.

In 1771 notes of the speeches were published in several journals, accompanied, for the first time, with the names of the speakers; and Col. George Onslow, member for Guildford, and a nephew of the late Speaker, who had been provoked by the opprobrious terms applied to him by some of the reporters, precipitated a conflict between the House and the press by making a formal complaint of several journals "as misrepresenting the speeches and reflecting on several of the members of this House." Certain printers were in consequence ordered to attend the bar of the House. Some appeared and were discharged, after receiving, on their knees, a reprimand from the Speaker. Others evaded compliance: and one of them, John Miller, who failed to appear, was arrested by its messenger, but instead of submitting, sent for a constable and gave the messenger into custody for an assault and false imprisonment. They were both taken before the Lord Mayor (Mr. Brass Crosby), Mr. Alderman Oliver, and the notorious John Wilkes, who had recently been invested with the aldermanic gown. These civic magistrates, on the ground that the messenger was neither a peace-officer nor a constable, and that his warrant was not backed by a city magistrate, discharged the printer from custody, and com-

Further contest with the Lord Mayor and Aldermen of London.

(*o*) See Dr. Johnson, Life of Cave; Nicholls, Literary Anecdotes; Hunt, Fourth Estate; and May, Const. Hist., ii. 37.

(*p*) Cobbett's Parl. Hist., x. 810.

mitted the messenger to prison for an unlawful arrest. Two other printers, for whose apprehension a reward had been offered by a government proclamation, were collusively apprehended by friends, and taken before Aldermen Wilkes and Oliver, who discharged the prisoners as "not being accused of having committed any crime." These proceedings at once brought the House into conflict with the Lord Mayor and Aldermen of London. The Lord Mayor and Alderman Oliver, who were both members of parliament, were ordered by the House to attend in their places, and were subsequently committed to the Tower. Their imprisonment, instead of being a punishment, was one long-continued popular ovation, and from the date of their release, at the prorogation of parliament shortly afterwards, the publication of debates had been pursued without any interference or restraint (*q*).

Reporting as a breach of privilege.

Though still in theory a breach of privilege, reporting is now encouraged by parliament as one of the main sources of its influence—its censure being reserved for wilful misrepresentation only. But reporters long continued beset with many difficulties. The taking of notes was prohibited, no places were reserved for reporters, and the power of a single member of either House to require the exclusion of strangers was frequently and capriciously employed. By the ancient usage of the House of Commons any one member by merely "spying" strangers present could compel the Speaker to order their withdrawal without putting the question. This power was exercised in 1849, and, after an interval of twenty-one years, in 1870. Its subsequent enforcement in 1872, 1874, and in later years, caused considerable inconvenience, and at length in 1875, the House was induced to adopt a modification of the rule. By a resolution passed in May of that year, while leaving the personal discretion of the Speaker unfettered, he was directed that whenever the presence of strangers should be brought to his notice by a member, he should, forthwith, without any debate or amendment, put the question of their withdrawal for the decision of all the members present. Although not made a standing order, this

Exclusion of strangers.

(*q*) Cobbett's Parl. Hist. xvii. 59-163.

resolution, in the absence of further instructions from the House, has since been acted on by the Speaker in every case which has subsequently arisen.

Facilities afforded for reporting.

After the destruction of the Houses of Parliament by fire in 1834, separate galleries were assigned for the accommodation of reporters, and in 1845 the presence of strangers in the galleries and other parts of the House not appropriated to members was for the first time officially recognised in the orders of the House of Commons. The

Publication of division lists.

daily publication of the division lists as part of the proceedings of the House—which alone was wanting to complete the publicity of its proceedings and the responsibility of members—was not adopted by the commons until 1836, an example which was only followed by the lords in 1857. Previously it had been impossible to ascertain in the great majority of cases, what members were present at a division, and how they voted, the Houses themselves taking no cognisance of names, but only of numbers. On questions of great public interest, the exertions of individual members usually secured the publication of the names of the minority, and this practice—notwithstanding it was declared by the House of Commons in 1696 to be a breach of privilege "destructive of the freedom and liberties of parliament"—was persisted in, and latterly a list of the majority was also similarly published. The official daily publication of the division lists was followed up by the adoption by the commons in 1839, and by the lords in 1852, of the practice of publishing the names of members serving on select committees, with the questions

Publication of parliamentary reports and papers.

addressed to them by witnesses; and a few years previously, in 1835, the commons admitted the public into "community of knowledge as well as community of discussion" by directing all parliamentary reports and papers to be freely sold at a cheap rate.

Political results of reporting.

"The entire people," it has been well observed, "are now present, as it were, and assist in the deliberations of parliament. An orator addresses not only the assembly of which he is a member but, through them, the civilised world. His influence and his responsibilities are alike extended. Publicity has become one of the most important

instruments of parliamentary government. The people are taken into counsel by parliament, and concur in approving or condemning the laws, which are there proposed; and thus the doctrine of Hooker is verified to the very letter: 'Laws they are not, which public approbation hath not made so' " (*r*).

Publication of papers affecting character.

The revolution which has taken place since the eighteenth century in the relations between the House of Commons and the people is forcibly brought out by the conflict which occurred in 1836 between the House and the courts of law consequent upon the publication of the parliamentary reports and proceedings. In 1771 we have seen the commons in conflict with the magistrates of London to uphold the privilege of the inviolable secrecy of the proceedings of the House; in 1836 the object of their contention with the courts of justice was the privilege of publishing all their own papers for the information of the nation. Certain reports of the inspectors of prisons, printed by Messrs. Hansard in obedience to the orders of the House of Commons, contained severe animadversions on a book written by a Mr. Stockdale, who thereupon brought an action for libel against the printers. It having been proved that the book was of an indecent character, a verdict was given for the defendants on a plea of justification; but Lord Chief Justice Denman, before whom the cause was tried, observed incidentally that "the fact of the House of Commons having directed Messrs. Hansard to publish all their parliamentary reports, was no justification for them, or for any bookseller who publishes a parliamentary report containing a libel against any man." This denial of parliamentary privilege was met by a declaration of the commons that the power of publishing their proceedings and reports was "an essential incident of the constitutional functions of parliament," and that any person instituting a suit as to, or any court deciding on, a matter of privilege contrary to the determination of either House, would be guilty of a breach of privilege. Stockdale at once proceeded to bring other actions, and on the issue whether the printers were justified by the

(*r*) May, Const. Hist., ii. 53.

privilege and order of the House, the court of Queen's Bench unanimously decided against them (*s*). The sheriffs levied the amount of damages, and the House vindicated its privileges by committing Stockdale and his attorney Howard, and also the sheriffs (*t*). While in prison, Stockdale repeated his offence by bringing other actions, for which his attorney's son and clerk were committed: and the deadlock was at length only removed by the passing of an Act of Parliament providing that all such actions should be stayed on the production of a certificate or affidavit that the paper complained of had been published by the order of either House of Parliament (*u*). The right of a newspaper to publish a fair and faithful report of the debates and proceedings in parliament without any authorisation from either House was determined in 1868 by the decision of the court of Queen's Bench in *Wason* v. *Walter*, that no action for libel would lie against the proprietor of the *Times* for so doing (*w*).

IV. *Growth of Religious Liberty.*

Protestant nonconformity, fostered instead of being crushed by the very efforts of the church to enforce unity, had gained considerably in numbers, organisation, and political weight, during the reigns of the last two Stuarts; and the important services of the dissenters, in combining with the church to bring about the Revolution of 1688,

(*s*) *Stockdale* v. *Hansard* (1839), 9 Ad. & E. 1 [Denman's Broom's Const. Law, p. 875, and note, p. 968].

(*t*) *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273 [Denman's Broom's Const. Law, p. 961].

(*u*) 3 & 4 Vict. c. 9. Subsequently Stockdale's attorney, Howard, brought two actions against the officers of the House, which, on the grounds of excess of authority and informality in the Speaker's warrant, were given in the plaintiff's favour. But on a writ of error the judgment in the second action was reversed by the Court of Exchequer Chamber. *Howard* v. *Gossett* [1842], 10 Q. B. 352 [Denman's Broom's Const. Law, p. 970].

(*w*) *Wason* v. *Walter* (1868), 8 Best & Smith, 671. [A still more famous case of privilege in which the *Times* was concerned was that which, arising out of the publication in the *Times* of letters affecting Mr. Parnell's conduct in connection with Irish affairs, gave rise to a protracted trial before a Special Commission. As to which *cf. Law Magazine and Review*, No. cclxix., p. 394, for August, 1888.—Ed.]

were rewarded by the Toleration Act. This famous statute was far indeed from granting religious freedom; it repealed none of the Acts by which conformity with the Church of England was exacted, and left the civil disabilities of nonconformists under the Corporation Act of 1661 and the Test Act of 1673 (*x*) intact; but it recognised, for the first time, the right of public worship beyond the pale of the state church, by exempting from the penalties of existing statutes against separate conventicles and absence from church, all persons who should take the oaths of allegiance and supremacy, and subscribe a declaration against transubstantiation. Dissenting ministers were relieved from the restrictions imposed by the Act of Uniformity and the Conventicle Act upon the administration of the Sacrament and preaching in meetings (*y*), on condition that, in addition to taking the oaths, they signed the Thirty-nine Articles, with the exception of three and part of a fourth (*z*). Quakers were allowed to make an affirmation in lieu of taking the oaths. All meeting-houses were required to be registered, but when registered their congregations were protected from molestation (*a*).

Toleration Act, 1 Will. & Mary, c. 18.

The principle of religious toleration was at yet, however, imperfectly established. Roman catholics and unitarians were specially excepted from the Act, and were soon afterwards subjected to additional penalties. Unitarians were disabled from holding any office ecclesiastical, civil, or military (*b*), and Roman catholics were placed under most severe restrictions (*c*). In 1700 an Act was passed offering a reward of £100 for the discovery of any Roman catholic priest exercising the functions of his office, and subjecting him to perpetual imprisonment. By the same Act every Roman catholic was declared incapable of inheriting or purchasing land, unless he abjured his

Toleration only partially established.

(*x*) *Supra*, pp. 602, 603.
(*y*) *Supra*, pp. 606, 607.
(*z*) The articles excepted (as expressing the distinctive doctrines of the Church) were Arts. 34, 35, 36, and part of Art. 20.
(*a*) 1 Will. & Mary, c. 18, confirmed by 10 Anne, c. 2.
(*b*) 9 Will. III. c. 35.
(*c*) 1 Will. & Mary, st. 2, c. 1.

religion upon oath, and on his refusal his property was vested, during his life, in his next of kin, being a protestant. He was also prohibited from sending his children abroad to be educated (*d*).

Temporary reaction under Anne.

During the tory ascendancy of the last four years of Queen Anne's reign, serious inroads were made upon the toleration formerly granted to protestant nonconformists, more especially by two statutes, the Occasional Conformity Act (*e*) and the Schism Act (*f*). The former, passed in 1711, was intended to prevent the evasion of the Test Act by occasional conformity on the part of those dissenters who, while adhering to their own form of worship, did not hesitate occasionally to receive the sacrament according to the rites of the established church. The other Act, passed in 1713, for "preventing the growth of schism," was framed in the true persecuting spirit, to deprive dissenters of the means of educating their children in their own religious beliefs, by crushing all nonconformist schools, some of which had already attained a certain degree of eminence. These reactionary statutes were, however, both repealed in 1718, under George I. (*g*), and from the beginning of the reign of George II. civil offices were practically thrown open to protestant dissenters, by means of the Annual Indemnity Acts passed in favour of those who had failed to qualify themselves under the Corporation and Test Acts (*h*). The severe laws against the Roman catholics, although enforced by a proclamation of Queen Anne in 1711, by a further Act of Parliament after the Rebellion

Annual Indemnity Acts under George II.

(*d*) 11 & 12 Will. III. c. 4; 13 Will. III. c. 6.

(*e*) 10 Anne, c. 5.

(*f*) 12 Anne, c. 7.

(*g*) 5 Geo. I. c. 4. In 1697, Sir Humphrey Edwin, Lord Mayor of London, and a presbyterian, gave great offence to churchmen by going in civic state to a dissenting meeting-house. To prevent any repetition of the scandal, the Act of 5 Geo. I. (now repealed by the Statute Law Revision Act, 1871), while repealing the Occasional Conformity Act, enacted that no mayor, bailiff, or other magistrate should attend any public meeting for religious worship, other than that of the Church of England, in the gown or with the ensigns of his office, on pain of being disqualified to bear any public office whatsoever.

(*h*) The first Indemnity Act was passed in 1727. Since then, with a few exceptions, similar Acts were annually passed, until the repeal of the Test and Corporation Acts in 1828.

of 1715 (*i*), and by another royal proclamation after the Rebellion of 1745, were also greatly mitigated in practice.

Lord Hardwicke's Marriage Act, 1753.

In 1753, a fresh restriction was imposed upon dissenters by Lord Hardwicke's Marriage Act (*k*), the immediate object of which was to prevent clandestine marriages. Dissenters had previously been allowed to be married in their own places of worship: but by this Act all marriages, except those of Jews and quakers, were required to be solemnised in a church, by ministers of the establishment and according to its ritual.

Relaxation of religious penal code under George III.

It was not, indeed, till the reign of George III., when the jacobitism of the Roman catholics had become lukewarm and innocuous, and the preaching of Wesley and Whitefield had stimulated and revived the dissenting sects, that the gradual relaxation of the religious penal code was commenced in earnest. Early in this reign the broad principles of toleration were judicially affirmed by the House of Lords, in the case of the City of London and the dissenters (*l*). "It is now no crime," said Lord Mansfield in moving the judgment of the House, "for a man to say he is a dissenter: nor is it any crime for him not to take the sacrament according to the rites of the Church of England: nay, the crime is, if he does it contrary to the dictates of his conscience." "Persecution for a sincere, though erroneous, conscience, is not to be deduced from reason or the fitness of things: it can only stand upon positive law. The Toleration Act renders that which was illegal before, now legal; the dissenters' way of worship is permitted and allowed by this Act; it is not only exempted from punishment, but rendered innocent and lawful; it is established; it is put under the protection, and is not merely under the connivance, of the law." "There is nothing certainly," he added, "more unreasonable, more

(*i*) 1 Geo. I. c. 55.

(*k*) 26 Geo. II. c. 33.

(*l*) *Chamberlain of London* v. *Allen Evans* (1767). The suit, originally instituted in the Sheriff's Court, was for a fine (under a by-law made in 1748) for refusing to serve as sheriff, on the ground of disability arising from not having taken the Sacrament, according to the rites of the Church of England, within a year before, as required by the Corporation Act of 13 Car. II. (Judgment of the House for the defendant.)

inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy" (*m*).

Despite the repugnance and opposition to catholic emancipation of George III., the ignorant bigotry of the masses which culminated in the Gordon riots of 1780, and the generally unsettled temper of parliament and the country as to the doctrines of religious liberty, the penal code, as regards both Roman catholics and protestant dissenters, was gradually, though unsystematically, relaxed.

Roman Catholic Relief Acts of 1778 and 1791.

By the Roman Catholic Relief Act of 1778, the precursor of the "No Popery" riots under Lord George Gordon in 1780, supplemented by another Act in 1791 (*n*), various penalties and disabilities were removed. Priests were no longer subjected to perpetual imprisonment for the performance of their sacred functions; Roman catholic heirs educated abroad were relieved from forfeiture of their estates to the next protestant heir; the prohibition to purchase landed property was removed; a modified freedom of worship and education was permitted; and Roman catholic peers, though still barred by the oath of supremacy from sitting in the House of Lords, were relieved from the banishment from the king's presence to which they had been subjected in 1678 (*o*).

Statutes relieving dissenters from religious disabilities.

In 1779, the Dissenting Ministers Act relieved protestant dissenting preachers and schoolmasters from the limited subscription to the Thirty-nine Articles required by the Toleration Act (*p*), and a further measure in 1812 (*q*) relieved them from the remaining oaths and declaration required by the latter statute. The following year witnessed the removal of the disabilities under which unitarians had laboured by a statute (*r*), repealing the exception of anti-trinitarians from the benefits of the

(*m*) Cobbett's Parl. Hist., xvi. 313-327.
(*n*) 18 Geo. III. c. 60, and 31 Geo. III. c. 32.
(*o*) 30 Car. II. st. 2.
(*p*) *Supra*, p. 743.
(*q*) 52 Geo. III. c. 155.
(*r*) 53 Geo. III. c. 160.

Toleration Act, as well as the provisions against them in the Act of 9 & 10 William III. "for the suppression of blasphemy and profaneness."

Their civil disabilities.

The civil disabilities of dissenters under the Test and Corporation Acts still remained to be grappled with. These monuments of bygone bigotry were not only unjust to a large and worthy section of the community, but hurtful to the very cause of religion itself by turning the most sacred ordinance of Christianity into "an office-key, a pick-lock to a place" (*s*). As early as 1718 the first Lord Stanhope, anxious, as he declared, to place the dissenters on a footing of perfect equality with churchmen, had endeavoured to procure the repeal of the Test Act at the same time that the Occasional Conformity and Schism Acts were abrogated. But owing to the strong opposition, the repeal of the Test Act was deferred to a more favourable opportunity. In 1736, Mr. Plumer brought forward a motion for its repeal: but Walpole, who had for years obtained the support of the dissenters by holding out the hope of his assistance when an opportune moment should arrive, voted against the motion, which was defeated by a majority of 128 (*t*). Half a century passed before another attempt was made by Mr. Beaufoy, in 1787, but, though repeated in 1789, his motion was unsuccessful. Mr. Fox was the next to take up the subject, in 1790, yet even his advocacy was impotent to overcome the determined opposition to a repeal. After a lapse of nearly forty years, Lord John Russell, more fortunate than his predecessors, obtained, in 1828, a success for which they had vainly striven. The civil disabilities of dissenters were at last swept away by the repeal of the Test and Corporation Acts; the sacramental test previously required as a qualification for civil, military, and corporate offices, being replaced by a declaration, "upon the true faith of a Christian," against injuring or disturbing the established church (*u*).

(*s*) Cowper, Works, i. 80.
(*t*) Lord Mahon, Hist. of Eng., i. 480; ii. 280.
(*u*) 9 Geo. IV. c 17.

Roman Catholic Emancipation Act, 1829.

The following year, 1829, witnessed the passing of the Roman Catholic Relief Act. From the date of the union with Ireland in 1801, the injustice of maintaining the political disabilities of the Roman catholics in a United Kingdom of which they formed no inconsiderable portion of the population, became more and more glaring. But George III. declared that he "should reckon any man his personal enemy" who proposed any measure of relief; and during the life of that king the liberal concessions with which Pitt had been anxious to inaugurate the union—and the refusal of which was signalised by his resignation of office—were compulsorily postponed. Under George IV. the question, which was annually contested in parliament, assumed a graver aspect. The "Catholic Association," formed by Daniel O'Connell, kept up a constant appeal to the excited passions of the Irish people, and at length the tory ministry of the Duke of Wellington, finding it necessary to choose between concession and civil war, introduced, and with the aid of the whigs carried through both Houses, the Emancipation Act of 1829. This measure, to which George IV. was with difficulty induced to give a reluctant and hesitating assent, was tardy indeed, but complete. It admitted Roman catholics, on taking the oath of allegiance with a repudiation of the doctrine that princes excommunicated by the pope might be deposed or murdered (instead of the oath of supremacy and declaration against transubstantiation and the adoration of the Virgin Mary), to both Houses of Parliament, to all corporate offices, to all judicial offices (except in the ecclesiastical courts), and to all civil and political offices, except those of regent, lord chancellor in England and Ireland (*w*), and lord lieutenant of Ireland. Additional restraints were, however, imposed by the Act upon the interference of Roman catholics in church patronage: jesuits and monks were prohibited from coming into the realm without licence; and provisions were inserted for regulating the residence of such as were already within the kingdom (*x*).

(*w*) The Irish chancellorship has since been thrown open to all creeds.
(*x*) 10 Geo. IV. c. 7.

In 1832 an Act was passed providing that Roman catholics in respect of their schools, places of worship, and charities, and of property held therewith, and of persons employed about them, should be subject to the same laws as were applicable to protestant dissenters (*y*). A few years later the policy of according perfect religious liberty to the Roman catholics was consummated by the repeal of almost all the enactments against them which (though for the most part obsolete) still remained on the statute book (*z*).

Repeal of penalties affecting Roman catholic religion and education.

A few supplementary measures were still required to complete the civil enfranchisement of dissenters. In 1833, Mr. Pease, the first quaker who had been elected to the House of Commons for 140 years, was allowed to take his seat on making an affirmation instead of an oath. In the same year quakers, Moravians, and separatists, were enabled by statute to substitute an affirmation in all cases for an oath (*a*).

Completion of civil enfranchisement of dissenters.

The Jews, banished from England under Edward I., had been suffered to return by Cromwell (*b*), but were not formally authorised to settle in England until after the Restoration (*c*). An Act of James I. (*d*) passed in 1610, and directed against the Roman catholics, had the collateral effect of debarring the Jews from the benefits of naturalization, by making the reception of the sacrament a necessary preliminary to naturalization in all cases. In the interest of trade and colonisation this requirement was partially relaxed by two subsequent statutes, which (1663) dispensed with the sacramental test in favour of all foreigners who had been engaged in the hemp and flax manufacture, and (1739) of all Jews and protestant foreigners who had resided seven years continuously in the American plantations (*e*). Notwithstanding the political

Jewish disabilities.

(*y*) 2 & 3 Will. IV. c. 115.
(*z*) 7 & 8 Vict. c. 102; 9 & 10 Vict. c. 59.
(*a*) 3 & 4 Will. IV. cc. 49, 82; and see 1 & 2 Vict. c. 77.
(*b*) [*Cf. supra*, pp. 119, 120, and note (*n*).—Ed.]
(*c*) Blunt, Hist. of the Jews in England, p. 72.
(*d*) *Supra*, p. 676.
(*e*) 15 Car. II. and 13 Geo. II. c. 7; Cobbett's Parl. Hist., xiv. 1373; Lecky, Hist. of Eng., i. 262.

disabilities attaching to them in England, the number of foreign Jewish settlers continued to increase with the expansion of English commerce; and at length, in 1753, an attempt was made to extend to all Jews applying for parliamentary naturalization the exemption from the sacramental test, already conceded to those who had resided in the colonies, or been engaged in the manufacture of hemp or flax. But the celebrated Jew Bill (*f*), by which this very moderate measure of toleration was effected, proved to be in advance of the opinion of the age. "No Jews! No Jews! No wooden shoes!" became the popular cry; and although the bill, after a fierce opposition in the House of Commons, obtained a fleeting place upon the statute book, it raised such a storm of opposition throughout the country as to necessitate its repeal in the following session (*g*). Jews were occasionally admitted to municipal offices, together with protestant nonconformists, under cover of the annual Indemnity Acts; but the declaration "on the true faith of a Christian," imposed by the Act 9 Geo. IV. c. 17, while relieving dissenters from the requirements of the Test and Corporation Acts, had forged new fetters for the Jew. These were removed, so far as regards corporations, in 1845 (*h*); and after a lengthened struggle, the only legal obstacle to the admission of Jews to parliament was also removed, in 1858, by an Act which empowered either House of Parliament, by resolution, to omit the words "upon the true faith of a Christian" from the oath of Abjuration (*i*).

Admission of Jews to parliament, 1848.

In 1836 a civil registration of births, marriages, and deaths was established; and by another Act, dissenters were permitted to solemnise marriages in their own chapels, registered for that purpose (*k*). The grievance complained of by dissenters with regard to burials (though destined,

Dissenters' Marriage Act, 1836.

(*f*) *Supra*, p 676.

(*g*) Lord Mahon, Hist. of Eng., iv. 32-37.

(*h*) 8 & 9 Vict. c. 52.

(*i*) 21 & 22 Vict. c. 49; 23 & 24 Vict. c. 63. By the 29 & 30 Vict. c. 19, all distinctions between Jewish and other members were removed by the enactment of a new form of oath from which the words "on the true faith of a Christian" were omitted.

(*k*) 6 & 7 Will. IV. cc. 85, 86

doubtless, soon to disappear) (*kk*) still continues in the country districts of England, mitigated, however, by the practice of some incumbents who allow dissenting ministers to perform their own burial service in the parish churchyard; and in populous towns the dissenters have generally provided themselves with separate burying-grounds and unconsecrated parts of cemeteries. Lastly, in 1871, one of the few remaining disabilities of dissenters was redressed by the Universities Tests Act, which opened all lay academical degrees and all lay academical and collegiate offices in the universities of Oxford, Cambridge, and Durham to persons of any religious belief.

Universities Tests Act, 1871.

Convocation.

On the early history of Convocation (*l*) and its relations to the King and Parliament something has been said (*ll*). From the passing of the Act 25 Hen. VIII. c. 19 (*m*) Convocation has ceased to possess any independent legislative power, church and state being alike subjected to the supreme power of parliament. Under Elizabeth it was occasionally consulted on questions affecting the national religion, and it confirmed, in 1562-1563, the Thirty-nine Articles. By the king's licence Convocation established certain canons in 1604 (which, however, not having been confirmed by parliament, are not binding on the laity); and attempted to make further regulations in 1640 (*mm*); but from the year 1664, when the practice of ecclesiastical taxation was discontinued, even discussions in Convocation practically ceased. About the time of the Revolution attempts were made to resuscitate the action of Convocation, more especially by Atterbury (afterwards Bishop of Rochester), who published a book entitled "The Rights and Privileges of an English Con-

(*kk*) [The Local Government Act, 1894 (56 & 57 Vict. c. 73), known as the Parish and District Councils Act, confers, by sec. 7, upon the parish meeting the right of adopting the Burial Acts, 1852-1885; while the secularisation of the parish churchyard was practically effected by the Burial Act of 1900. —Ed.]

(*l*) [The note on pp. 552, 553 of the previous edition has been transferred to this place in the text as being a more suitable one in view of the relationship of the subject to the matter preceding it.—Ed.]

(*ll*) *Supra*, pp. 232, 233, and notes.

(*m*) *Supra*, p. 409 and note.

(*mm*) *Supra*, p. 552.

Suspended, 1717.

vocation." In 1717, the religious ferment excited by the Bangorian controversy (arising out of the denunciation by the Lower House of Convocation of a sermon in favour of religious liberty preached by Hoadley, Bishop of Bangor), induced the ministers of George I. suddenly to prorouge the would-be ecclesiastical parliament. From this time Convocation, though regularly summoned, was for more than a century as regularly prorogued immediately after it had assembled. In 1850 it was again allowed to resume the discussion of church matters; and in 1861 was empowered by royal licence to alter the 29th canon of 1604, which prohibited parents from acting as sponsors to their children; but it was specially provided in the licence that no alteration should be of any validity until confirmed by letters patent under the great seal. In 1872, letters of business were issued by the crown empowering Convocation to frame resolutions on the subject of public worship, and these were afterwards incorporated in an Act of Parliament (Act of Uniformity Amendment Act, 35 & 36 Vict. c. 35) (*n*).

Resumed, 1850.

[The co-operation of the lay element in the deliberations of both Houses of Convocation had long been felt as a want; and in 1886 a House of Laymen for the province of Canterbury, composed of elected members, was formed. This was shortly followed by a similar body for the northern ecclesiastical province of York. Yet these representative meetings, which are summoned by the archbishops to attend at the time of the assembling of Convocation, are essentially voluntary and possess no legal status. Such constitutional character can only be conferred by the legislature; thus, pending such statutory recognition, a voluntary association, called the Representative Church Council, has been called into being. It met for the first time in 1904, and is composed of three Houses:

The Representative Church Council.

"(a) The Upper Houses of the Convocations of Canterbury and York.

"(b) The Clergy of the Lower Houses of both Convocations.

(*n*) See Hallam, Const. Hist., iii. 242-247; Stephen, Commentaries [5th ed.], ii. 544-546; [and Anson, Law and Custom of the Const., vol. ii. pt ii. (1908), pp. 224 *seq.*—Ed.]

"(c) The members of the Houses of Laymen of both provinces.

"Acceptance by each of these Houses is necessary to constitute an act of the whole body.

"The functions of the council, which is purely voluntary in its nature, but for which it is hoped to obtain statutory powers, are to discuss important questions, such as licensing, education, or purely ecclesiastical matters, and pass resolutions thereon. The resolutions passed by the council come subsequently before the joint meeting of both Convocations, which considers whether they are to be made Acts of Convocation or not"] (*nn*).

V. *Liberty of the Press.*

Of the political privileges of the people acquired or enlarged since the Revolution, we have still to consider the liberty of the press—"the guardian and guide of all other liberties" (*o*)—and the last to be recognised by the state.

We have seen how freedom of opinion in religious matters was early restrained by the action of the church against the Lollard teachers and writers (*oo*); and soon after the invention of printing in the fifteenth century the press was placed under a rigorous censorship, not only in England but throughout Europe. After the reformation in England, the censorship of the press passed with the ecclesiastical supremacy to the crown. It became a part of the royal prerogative to appoint a licenser, without whose *imprimatur* no writings could be lawfully published; and the printing of unlicensed works was visited with the severest punishments. Printing was further restrained by patents and monopolies. The privilege was confined, in the first instance, under regulation established by the Star Chamber in Queen Mary's reign, to members of the Stationers' Company, and the number of presses, and of men to be

The censorship

(*nn*) [E. W. Ridges, "Constitutional Law of England" (1915), p. 319.—Ed.]

(*o*) Earl Russell, Eng. Con., p. 339.

(*oo*) *Supra*, pp. 392, 393.

employed on them, was strictly limited. Under Elizabeth, the censorship was enforced by more rigorous penalties. All printing was interdicted elsewhere than in London, Oxford, and Cambridge; and nothing whatever was allowed to be published until it had first been "seen, perused, and allowed" by the Archbishop of Canterbury or the Bishop of London, except only publications by the queen's printers, to be appointed for some special service, or by law-printers, for whom the licence of the chief justices was sufficient (*p*). Mutilation or death was the penalty of those who dared to print anything which the judges might choose to construe as seditious or slanderous of the government in church or state (*pp*).

The press under James I. and Charles I.

Under James I. and Charles I., political and religious discussion was repressed by the Star Chamber with the greatest severity (*q*). By an ordinance of the Star Chamber, issued in July, 1637, the number of master printers was limited to twenty, who were to give sureties for good behaviour, and were to have not more than two presses and two apprentices each (unless they were present or past masters of the Stationers' Company, when they were allowed three presses and three apprentices): and the number of letter-founders was limited to four. The penalty for practising the arts of printing, book-binding, letter-founding, or making any part of a press, or other printing materials, by persons disqualified, or not apprenticed thereto, was whipping, the pillory, and imprisonment. Even books which had been once examined and allowed were not to be reprinted without a fresh licence; and books brought from abroad were to be landed in London only, and carefully examined by licensers appointed by the Archbishop of Canterbury and the Bishop of London, who were empowered to seize and destroy all such as were "seditious, schismatical, or offensive." Periodical searches, both of booksellers' shops and private houses, were also enjoined and authorised. Yet it was during this inauspicious period

(*p*) Ordinances of the Star Chamber for the regulation of the press in 1585, *supra*, p. 449.

(*pp*) St. 23 Eliz. c. 2. See the cases of Stubbe, Udal, Barrow, Greenwood, and Penry, *supra*, pp. 439 and 443.

(*q*) *Supra*, pp. 535 *seq.*

that the first newspaper, the *Weekly Newes*, made its appearance, late in the reign of James I. (*r*); and after the abolition of the Star Chamber (February, 1640-1), tracts and newspapers issued forth in shoals during the contest between the crown and the parliament (*s*). The Long Parliament, however, while abolishing the Star Chamber, continued the censorship of the press; and endeavoured to silence all royalist and prelatical writers by most tyrannical ordinances, "to repress disorders in printing," by which the messengers of the government were empowered to break open doors and locks, by day or by night, in order to discover unlicensed printing-presses, and to apprehend authors, printers, and others. These proceedings called forth the "Areopagitica" of Milton, in which he branded the suppression of truth by the licenser as the slaying of "an immortality rather than a life," maintained that "she needs no policies, no stratagems, no licensings, to make her victorious," and nobly, but ineffectually, pleaded for "the liberty to know, to utter, and to argue freely, according to conscience, above all [other] liberties" (*t*).

The first newspaper, the *Weekly Newes*, 1623.

The censorship continued under the Commonwealth.

After the Restoration, the entire control of printing was placed in the hands of the government by the Licensing Act of 1662, which, though originally passed only for three years, was continued by subsequent renewals until 1679. Printing was strictly confined to London, York, and the two universities; the number of master printers was limited, as in the ordinances of the Star Chamber, in 1637, to twenty; and no private person was to publish any book or pamphlet unless it were first licensed—law books by the lord chancellor, or one of the chiefs of the common law courts, historical or political books by the secretary of state, books of heraldry by the earl marshal, and all other books by the Archbishop of Canterbury, or the Bishop of London, or by the chancellor or vice-chancellor of one of the univer-

Licensing Act, 1662.

(*r*) The *Weekly Newes*, May 23, 1623, printed for Nicholas Bourne and Thomas Archer.—May, Const. Hist., ii. 240.

(*s*) More than 30,000 political pamphlets and newspapers were issued from the press during the twenty years from 1640 to the Restoration. They may be seen at the British Museum bound up in 2,000 volumes.—*Ibid.* ii. 241.

(*t*) Milton, Areopagitica: a Speech for Liberty of Unlicensed Printing, pp. 73, 74. [Arber's Reprints.]

sities (*u*). Authors and printers of obnoxious works were hanged, quartered, mutilated, exposed in the pillory, flogged, or simply fined and imprisoned, according to the temper of the judges; and the works themselves were burned by the common hangman (*w*). After the Licensing Act had been temporarily suffered to expire in 1679, the twelve judges, with Chief Justice Scroggs at their head, declared it to be criminal at common law to publish anything concerning the government, whether true or false, of praise or censure, without the royal licence (*x*). All newspapers were in consequence stopped; and the people were reduced for political intelligence and instruction to two government publications, the official *London Gazette*, which furnished a scanty supply of news without comment, and the *Observator*, which consisted of comment without news. In the absence of newspapers, the coffee-houses became the chief organs through which the public opinion of the [capital] vented itself, while the inhabitants of provincial towns, and the great body of the gentry and country clergy, depended almost exclusively on news-letters from London for their knowledge of political events (*y*).

Licensing Act revived, 1685.

At the accession of James II., in 1685, the Licensing Act was revived for seven years, and was thus in force at the Revolution. It was once more renewed in 1692, for one year and until the end of the following session of parliament; but a further attempt to renew it in 1695 was negatived by the commons, and thenceforth the censorship of the press has ceased to form part of the law of England. It is a noteworthy fact, and a striking example of the predominance of the practical as contrasted with the theorising spirit in English politics, that this emancipation of the press—which Macaulay did not hesitate to declare

Finally expired, 1695.

(*u*) 13 & 14 Car. II. c. 33.

(*w*) See the cases of John Twyn, State Trials, vi. 659; of Keach, *ibid.* 710; of Harris, Smith, Curtis, Carr, and Cellier, *ibid.* vii. 926-1043, 1111, 1183; and *cf.* May, Const. Hist., ii. 242.

(*x*) "If you write on the subject of government, whether in terms of praise or censure, it is not material; for no man has a right to say *anything* of government."—*Carr's case* (1680), 7 State Trials, 929. This monstrous opinion was not judicially condemned until 1765, by Lord Camden, Chief Justice of the Common Pleas, in the case of *Entick* v. *Carrington*, 19 State Trials, 1030. [*Cf.* Broom, Const. Law, pp. 555-609.]

(*y*) See Macaulay, Hist. Eng., ch. iii. [1861, i. pp 389-392.]

"has done more for liberty and for civilisation than the Great Charter or the Bill of Rights" (*z*)—attracted scarcely any attention at the time; and was justified by the commons, in conference with the lords, without any reference to the great principle involved, and solely on questions of detail concerning the abuses and inconveniences incidental to the censorship.

The press theoretically free, but still subject to restraints.

The press was now theoretically free; but in practice it was still subject to several methods of restraint. The way in which the summary jurisdiction of parliament was employed to check the publication of debates has already been referred to, with reference to the privileges of the House of Commons (*a*); and the government also made use of two other means of controlling the press: (1) the stamp duty on newspapers, and (2) the law of libel. Newspapers, however, quickly multiplied when freed from the censorship, and in the reign of Queen Anne assumed their present form, combining intelligence with political discussion (*b*). At the same time the intellectual character of the periodical literature was raised, and its influence widely extended, by the talents of writers like Addison, Steele, Swift, and Bolingbroke.

But the press soon became the favourite instrument of party warfare, and by its scurrilous language excited a strong feeling of opposition to it among the governing classes. Each party, when in power, endeavoured to crush its opponents by prosecuting as seditious libels all publications which supported the opposition. The revival of the Licensing Act was even suggested, but dismissed as impracticable: and the stamp duty on newspapers and advertisements was adopted instead, avowedly for the purpose of restraining the press generally and of crushing the smaller papers. The first Stamp Act was passed in the tenth year of Queen Anne (*c*), and being found efficient both as a check on the circulation of cheap periodicals and as a source of revenue, the stamp was gradually raised to fourpence. At the end of George III.'s reign it was

Stamp duty on newspapers.

(*z*) *Ibid.* 1861, iv. 542.
(*a*) *Supra*, pp. 731 *seq.*
(*b*) The first daily paper, the *Daily Courant*, was issued in 1709.
(*c*) 10 Anne, c. 19.

extended, by one of the series of statutes known as the Six Acts (*d*), to tracts and other unstamped periodicals which, while professing not to be newspapers, had obtained a wide circulation among the poor as disseminators of political news and dissertations. Evasions of the stamp duty were frequent, and the state and the contraband press continued at war until after the Reform Act of 1832. In 1833 the advertisement duty, which had been increased under George III., was reduced in amount, and in 1853 was relinquished altogether. In 1836 the stamp on newspapers was lowered to 1d., and in 1855 abandoned. The duty on paper, which had latterly proved a serious stumbling-block in the way of popular education, was swept away in 1861 (*e*).

Law of libel.

A far more powerful instrument for the suppression of freedom of discussion than the Stamp Act was the law of libel. This was rigorously enforced by the government under William III. and Anne; but during the reigns of the first two Georges the press generally enjoyed more toleration, Sir Robert Walpole being indifferent to its attacks, and openly avowing his contempt for political writers of all parties. Shortly after the accession of George III., the nation, taking a keen interest in political affairs, and finding itself unrepresented in a corrupt House of Com-

(*d*) The Six Acts (60 Geo. III. and 1 Geo. IV. cc. 1, 2, 4, 6, 8, 9) were a batch of repressive measures passed at the instance of the government, in 1819, in consequence of the disturbed state of the country. By the first (c. 1) the training of persons to the use of arms was prohibited; by the second (c. 2) the magistrates in the disturbed counties were authorised to search for and seize arms; by the third (c. 4) defendants in cases of misdemeanour were deprived of the right of traversing; by the fourth (c. 6), called the Seditious Meetings Act, extraordinary powers were conferred on the executive, and all meetings of more than fifty persons for the discussion of public grievances were prohibited, except under very stringent conditions; by the fifth (c. 8) the courts of law were enabled, on the conviction of a publisher of a seditious or blasphemous libel, to order the seizure of all copies of the libel in his possession or that of any other person specified, and on a second conviction to punish him with fine, imprisonment, or banishment. The sixth (c. 9) extended the newspaper stamp duty to cheap political pamphlets and periodicals, as mentioned in the text. All these Acts were permanent except the Seditious Meetings Act, which was limited to five years, and the Seizure of Arms Act, which expired on March 25, 1822. The punishment of banishment inflicted by the Seditious Libels Act was repealed in 1830 by 11 Geo. IV. and 1 Will. IV. c. 73.

(*e*) *Supra*, p. 550, *n.*

mons, sought utterance for its opinions in the columns of the press, which from this time rapidly rose into a formidable political power. A renewed conflict with the government was the natural result. Lord Bute, the premier, was driven from power (April 8, 1763) mainly by the criticism of Wilkes in the *North Briton*, and a fortnight afterwards (April 23) the celebrated No. 45 of that journal appeared, commenting in severe and offensive terms on the king's speech at the prorogation of parliament and upon the unpopular Peace of Paris recently (February 10, 1763) concluded. By a strained exercise of prerogative a general warrant was issued for the discovery and apprehension of the authors and printers (not named) of the obnoxious No. 45. Forty-nine persons, including Wilkes, were arrested on suspicion under the general warrant: and it having been ascertained that Wilkes was the author, an information for libel was filed against him in the King's Bench on which a verdict was obtained (*f*). Released from prison on the ground of privilege as a member of parliament (*g*), Wilkes brought an action against Mr. Wood, the under-secretary of state, and obtained a verdict of £1,000 damages (*h*): and four days afterwards Dryden Leach, one of the printers arrested on suspicion, gained another verdict with £400 damages against the messengers. On a bill of exceptions, which was argued before the court of King's Bench in 1765, Lord Mansfield and the other three judges pronounced the general warrant illegal, declaring that "no degree of antiquity could give sanction to an usage bad in itself" (*i*).

No. 45 of the *North Briton*.

In the same year, 1765, an action brought by Mr. John Entick, the suspected author of the *Monitor, or British Freeholder*, against the messengers who had seized all his books and papers under a general search warrant from the secretary of state, was decided against the government. Lord Camden, Chief Justice of the Common Pleas, deter-

Seizure of papers under general search warrant.

(*f*) *Rex* v. *Wilkes*, 4 Burr. 2527, 2574.

(*g*) *Supra*, pp. 731 *seq.*

(*h*) *Wilkes* v. *Wood* (1765), 19 State Trials, 1153. [Broom, Const. Law, pp. 544 *seq.*]

(*i*) *Leach* v. *Money* (1765), 3 Burr. 1692, 1742; 19 State Trials, 1001. [Broom's Const. Law, pp. 522 *seq.*]

mined that such warrants, which had originated in the practice of the Star Chamber, and had been unjustifiably continued since the expiration of the Licensing Act of Charles II., were absolutely illegal (*k*).

Junius' "Letter to the King," 1769.

The excitement caused by the proceedings against Wilkes and the printers had scarcely subsided, when the prosecutions which followed upon the publication of Junius' celebrated "Letter to the King" in the *Morning Advertiser* of December 19, 1769, forcibly directed the attention of the public to the severe and extended interpretation of the law of libel adopted by the judges since the Revolution. Already, in 1731, on the trial of one Franklin for publishing a libel in the *Craftsman*, it had been held that falsehood, though always alleged in the indictment, was not essential to the guilt of the libel, and Lord Raymond positively refused to admit of any evidence to prove the truth of the statements complained of. On the trial of Almon, a bookseller, for selling a reprint of Junius' letter, two other doctrines which excepted libels from the general principles of the common law were maintained by the courts. (1) It was held that the publisher of a libel was criminally liable for the acts of his servants, unless proved to be neither privy nor assenting thereto; and afterwards the judges decided that exculpatory evidence was inadmissible, and that publication of a libel by the servant was conclusive proof of the criminality of the master. (2) Lord Mansfield laid it down that it was the province of the judge alone to determine the criminality of a libel, leaving to the jury to determine merely the fact of publication, and whether the libel meant what it was alleged in the indictment to mean. On the trial of Woodfall, the original publisher of the "Letter to the King," the jury, in order to defeat this interpretation of the law, found the defendant "guilty of printing and publishing only,"—a verdict which the court held to be uncertain, necessitating a new trial. Miller and other printers who were subsequently

(*k*) *Entick* v. *Carrington* (1765), 19 State Trials, 1030. [Broom, Const. Law, pp. 555-609.] [The issue of search warrants was later regulated by the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103, and a large number of other statutes for specified purposes.]

tried for printing the same letter were boldly declared by the jury to be "not guilty."

Rights of juries in libel cases.

The doctrine held by the judges in these trials was strongly animadverted upon in both Houses of Parliament; and the rights of juries in cases of libel were nobly and eloquently maintained by the advocacy of Erskine in the cases of the Dean of St. Asaph, in 1779, and of Stockdale, 1789, the latter being a prosecution for publishing what was charged as "a scandalous and seditious libel" concerning the conduct of the House of Commons in its impeachment of Warren Hastings. At length, in 1792, the ruling of the judges as to the province of juries was in effect reversed by Mr. Fox's Libel Act, which declared their right, on any trial or information for libel, to give a general verdict of guilty or not guilty on the whole matter (*l*).

Reactionary period in growth of liberty of opinion, 1792-1832.

But the signal advance made by liberty of opinion during the first thirty years of George III.'s reign was about to receive a decided check. The proceedings of the French revolutionists created a widespread terror of democracy among the great body of the English people, which was aggravated by the extravagance of a small but turbulent body of social and political reformers in England itself. With the publication by the government, in 1792, of a proclamation warning the people against wicked and seditious writings industriously dispersed among them, and commanding magistrates to discover the authors, printers, and promulgators of such writings, began a reactionary period in the growth of liberty of opinion which cannot be said to have entirely passed away until after the passing of the Reform Act of 1832. During this period, prosecutions of the press abounded: seditious speaking was severely restrained: and the regulation of newspapers frequently occupied the attention of the legislature.

Freedom of the press completely established from 1832.

But from the year 1832, at latest, the freedom of the press has been completely established. The utmost latitude of criticism and invective has been allowed it in discussing the actions of the government and of all public men and measures. By Lord Campbell's Libel Act, passed in 1843,

(*l*) 32 Geo. III. c 60.

the defendant on an indictment or information for a defamatory libel is allowed to plead its truth, and that its publication was for the public benefit; and the harsh extension of the ruling in *Almon's case* (*m*), as to the criminal liability of the publisher for the unauthorised acts of his servants, has been altered by allowing the defendant in all cases to prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part (*n*). State prosecution for libel is now as much a thing of the past as the censorship itself. The policy of repression has been finally discarded; and rulers have at length recognised in practice the truth and wisdom of Lord Bacon's maxim, that the "punishing of wits enhances their authority; and a forbidden writing is thought to be a certain spark of truth, that flies up in the faces of them that seek to tread it out" (*o*).

We have now traced the English constitution from its germ in the free institutions of our Teutonic forefathers, and have marked the course of freedom as it slowly

"Broadens down from precedent to precedent,"

and has finally assumed that special form of parliamentary government under which it is our privilege to live. Amidst the vicissitudes of its growth and development, during the ten centuries spanned by the several dynasties which have ruled us from Egbert to Victoria, its birthright of freedom has ever been maintained. Even under Tudor autocracy, the external forms of constitutional government were observed; and the heritage of liberty was thus handed on to the generations yet to come, who were once more to make it all-powerful in the state. The preservation of that heritage has been mainly due to the combination of sturdy independence, reverence for law and order, and practical

(*m*) *Supra*, p. 760.

(*n*) 6 & 7 Vict. c. 96.

(*o*) On liberty of the press see Hunt, Fourth Estate; Andrews, Hist. of British Journalism; Hallam, Const. Hist., iii. 2-6, 166-168; May, Const. Hist. ii. 238-376; Macaulay, Hist. Eng., 1861, iv. 542-3, 603-9 [and Ency. Brit., 11th ed., article "Press Laws."—Ed.].

common sense which so pre-eminently distinguish the English people. Actuated by this spirit, they have been enabled, under the guidance of some wise and great sovereigns, and of a long line of illustrious statesmen, to adapt the English constitution to the varying needs of successive ages, while preserving its fundamental principles intact. The retrospect of the crises through which our constitution has safely passed, and of the dangers which it has triumphantly surmounted, may well enable us to look forward with confidence to a happy solution of the difficulties which perhaps yet await its further development in the future.

CHAPTER XVIII.

RECENT DEVELOPMENT OF THE CONSTITUTION (*p*).

THE close of the Victorian era was marked in the political history of England by a democratic upheaval, resulting in attacks upon the landlord class and "aristocratic predominance." The abolition of the House of Lords, the disestablishment of the Church of England, agrarian reform for England, and home government for Ireland were in the forefront of the radical programme. Yet, of these proposed measures only the last came, for the time, within the range of practical politics (*pp*). At the same time, many beneficent and salutary measures became law, the tendency of which was to ameliorate the social condition of the working classes (*q*).

The three Reform Acts, 1832, 1867, and 1884, through the extension of the franchise, broke down step by step the predominance of the gentry, or landed classes, in parliament and the state generally. The middle classes attained the position of an equally privileged factor with the landed classes in the province of administration, while the functions of the old self-government offices were usurped by elected committees of taxpayers; thus forming (so to say) a paid hierarchy of officials.

Local government.

While down to 1884 the tendency was more or less in the direction of centralisation—namely, the state as the sole

(*p*) [The ten pages of the seventh edition, forming the concluding section of chap. xvii., and written by the previous editor, Mr. Ashworth, have been set up as a new chapter, extending to twenty-five pages; so that a good deal of additional matter has been incorporated by the present editor.]

(*pp*) See *infra*, pp. 781 *seq.*

(*q*) The Allotments Act, 1887 (50 & 51 Vict. c. 48), the Public Health Acts, 1875 (38 & 39 Vict. c. 55) and 1890 (53 & 54 Vict. c. 59), the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), and the Workmen's Compensation Act, 1897.

and supreme fountain of all law and organisation—the changes wrought upon the constitution since 1887 were in the direction of decentralisation: the Local Government Acts (1888 and 1894) drawing the county, district, and parish communities, through their respective representative bodies, into direct relation to the central government, thus effecting a centralised system of local autonomy.

Local Government Act, 1888.

The Local Government Act of 1888 (51 & 52 Vict. c. 41) practically established the system of local authority, as it now obtains in England and Wales; depriving the justices of their right to administer the affairs of their counties, and vesting it in elective county councils. This Act took within its view of local administration three areas: the largest, the county; next, the sanitary district, whether urban or rural, which also comprehended municipal boroughs, themselves urban districts; lastly, the parish. The electors are the county electors, and, in a borough, the burgesses, *i.e.*, persons enrolled as such on the parliamentary registers. A county elector may be a male or a female, but must be enrolled as a burgess of some borough which is not a county borough, or else be registered as a county elector. The whole administrative business, with the powers which formerly resided in the justices, were, by the Act, practically transferred to the new representative body, the county. An exception was the police, which was only transferred in part, the control being thenceforth vested in a standing joint committee of quarter sessions and county council.

The main object of the Local Government Act of 1888 was "so far as possible, to give to counties that form of municipal government which had previously pertained only to English boroughs. . . . Every county council was made a corporation" (*qq*). Among the chief powers now vested in the county council are the following: the appointment of coroners (*r*); the maintenance of roads; prevention of river pollution; sanitary powers, including the appointment of sanitary officials; technical education; the care of lunatics; powers for the provision of allotments and small holdings; light railways; and the establishment of parish councils.

(*qq*) W. Blake Odgers, Local Govt., 2nd ed., p. 208.
(*r*) See *supra*, pp. 93, 172, and *n.* (*w*).

Local Government Act, 1894.

By the Local Government Act of 1894 (56 & 57 Vict. c. 73), in every rural parish which is not included in an urban district a parish meeting shall be held, consisting of the parochial electors of the parish, whose names are enrolled on the parliamentary or local government registers. A parish council was by this Act called into existence in every parish situate in a rural sanitary district which had a population of three hundred or upwards at the census of 1891. If the parish has a population of one hundred or upwards, the county council must make an order for the election of a parish council, if the parish meeting desires it. Where there is no parish council, the various powers conferred upon a council are exercised by the parish meeting itself. The parish meeting must be held in every rural parish once a year, and, if there is no parish council, twice a year. The powers and duties of the parish council consist mainly: in the appointment of overseers; the custody of the parish books and registers; management of parish property, other than that vested in the ecclesiastical commissioners; lighting, watching; the establishment of baths and wash-houses; and the provision of burial grounds. The primary purpose of this measure was "to transform the vestries into district councils, and thus to restore local autonomy under a purely democratic system" (*rr*).

London Government Act, 1899.

By the London Government Act of 1899, the administrative County of London has been divided into twenty-eight boroughs, and the town councils, constituted for these boroughs by Order in Council under the Act, have taken over the powers and duties of the old vestries and district boards, together with some of the duties of the county council (*s*).

Progress in local government.

The fear that had been hitherto expressed, that a policy of "disintegration" (such as the establishment of self-governing units within the great framework of the state was declared to be) would result in chaos in the administration of local affairs, was falsified. Moreover, by the

(*rr*) [Taylor, Engl. Const., ii. 578; see also Odgers, Local Government; and the article on Local Government in Ency. Brit.—Ed.]

(*s*) [See Ridges, Const. Law of England (2nd ed., 1915), p. 395. The foregoing three paragraphs have been transferred here from chap. ix. of the preceding edition.—Ed.]

creation of a Board of Agriculture (1889) and by the Education Act of 1902 (*ss*), new fetters were forged which have brought the local government units into close interworking with the legislative body of the whole realm. In this way was attempted, and in great measure carried out, a revival of the ancient communal system (*mark*) (*t*).

"Thus England, at the close of the nineteenth century, attained what continental nations had for two centuries past enjoyed—a hierarchical reconstruction of the official organisation within the internal administration" (*u*).

The development of the English constitution at the close of the Victorian era was marked by two main tendencies: local government (already referred to) and imperialism. Imperialism in its broadest sense, as denoting the closest connection between the various colonies and dependencies of the crown and the mother country, is a hitherto unsolved problem. Certain it is that many British colonies desire such federation as would enable them to share in legislation for the British Empire: others again shrink from the burdens which such relationship would impose upon them. The first step in the direction of intercolonial federation was the formation of the Commonwealth of Australia—a confederation of the six original states, New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania—in 1900 (*w*). The executive power in this union is henceforth vested in the sovereign, assisted by an executive council of seven members, and the legislative power in a federal parliament. Imperialism.

The advent of King Edward VII. to the throne found the country still in the throes of the South African conflict, and the subjugated countries yet under martial law. The first duty of the government in the new reign was to pacify this part of the empire, and to assimilate and federate its Union of South Africa.

(*ss*) 2 Edw. VII. cap. 19. This Act abolished School Boards and transferred their power to education committees of the county, &c., brought the local educational bodies into direct dependence upon the imperial government, and was a necessary supplement to the Education Act of 1870, when once the machinery of local government had been introduced.

(*t*) *Cf. supra*, as to the mark system, p. 5.

(*u*) Hatschek, Englisches Staatsrecht (Tübingen, 1905).

(*w*) The Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12); letters patent of September 17, 1900.

component parts. This result, largely owing to the patriotism and loyalty of the leaders in the various states with whom England had been lately at war, was successfully effected. By the South Africa Act (*x*) the self-governing colonies—the Cape of Good Hope, Natal, the Orange River Colony, and the Transvaal—were united into a legislative union under the name of the Union of South Africa; the government residing in a governor-general, appointed by the sovereign, assisted by an executive council; the representative bodies consisting of a senate of forty members and a House of Assembly of 121 elected members.

Canada.

Canada, which, with Australia, displayed its loyalty to the mother country in the Boer War (1899-1902), has also, with Australia, been desirous of still closer ties binding the outlying parts of the British Empire into one political and economic whole. The initiative in this direction was taken by Mr. Chamberlain (formerly colonial secretary), who planned a grand imperial customs union, which, with its correlative, tariff reform, is still the watchword of tory imperial politics. This project awaits, and, owing to the abandonment of free trade principles which it involves, may long await, realisation.

Imperial defence.

Meanwhile, apart from the economic side, the question of imperial defence has been warmly taken up by the British self-governing colonies, and, through a Conference on Imperial Defence in 1907, the foundations were laid for a scheme of naval and military organisation in which the colonies should share the risks with the mother country. Already, Canada, Australia, New Zealand, and the Cape have voted warships to form an integral portion of the British naval forces, and have entered into a scheme for the tactical employment of all their strength, military and naval, in the interests of the empire (*y*). Although no immediate practical results on the economic side are to be anticipated, yet the co-operation of all the units of the empire in its defence was practically secured, and was manifested in a remarkable manner during the Great War.

(*x*) 9 Edw. VII., c. 9.

(*y*) *Cf.* Blue-Books, July and November, 1910, dealing with Colonial Representation on the Committee of Defence.

In 1917 at the War Conference of the Empire held in London, the following resolutions (among others) were adopted: (1) That meetings of an imperial cabinet should be held annually, or at any intermediate time when matters of urgent imperial concern require to be settled, and that the imperial cabinet should consist of the prime minister of the United Kingdom and such of his colleagues as deal specially with imperial affairs, of the prime minister of each of the dominions, or some other specially accredited person possessed of equal authority, and of a representative of the Indian people to be appointed by the Indian Government (*yy*). (2) That a special conference should be held for readjusting the constitutional relations of the constituent parts of the empire. (3) That at all future conferences India should be fully represented, and that in regard to the position of Indians in the self-governing dominions the principle of reciprocity of treatment should apply as between India and those dominions. (4) That for the purpose of safeguarding the security of the empire the admiralty should prepare a scheme of naval defence, and that special consideration should be given to the production of naval and military material, munitions and supplies in all important parts of the empire. (5) That special encouragement be given to imperial resources, and particularly in making the empire independent of other countries in respect of food supplies, raw materials, and essential industries. Imperial proposals.

One great feature in the whole scheme of imperialism stands out in bold relief: the increased prestige and power of the colonial minister in the cabinet. Round him now centre all the great political questions affecting the British Empire throughout the world. Another aspect is the tacit understanding which has arisen between the two great parties in the state to regard all great imperial questions as lying outside the domain of party politics. Thus, both a continuity in foreign policy is assured, and the defensive forces of the empire, upon which its safety and external prestige depend, may rely upon the patriotic support of both parties in parliament.

(*yy*) [In June 1919, a bill was introduced for establishing responsible and progressive self-government in India, as an integral part of the empire.]

The House of Lords.

The death of King Edward VII., in May, 1910, found the country in the midst of a parliamentary crisis, from a constitutional point of view one of the most momentous in its whole political history. A finance bill (*z*), sent up by the House of Commons in 1909, having been rejected by the House of Lords on the ground of its not being *purely* a money bill, an appeal was made by the government to the constituencies on the main question of the relations between the two Houses of Parliament; and a general election took place in January, 1910. The issue of this appeal to the electorate was decided in favour of the liberal party at the polls, and a liberal government was again returned to power. When the new parliament assembled on February 21 following, the speech from the throne formulated in distinct words the new situation, which cut at the very root of the hereditary principle in the House of Lords. "Recent experience," it said, "has disclosed serious difficulties, due to recurring differences of strong opinion, between the two branches of the legislature. Proposals will be laid before you, with all convenient speed, to define the relations between the Houses of Parliament so as to secure the undivided authority of the House of Commons over finance, and its predominance in legislation. These measures, in the opinion of my advisers, should provide that that House should be so constituted and empowered as to exercise impartiality in regard to proposed legislation, the functions of initiation, revision, and, subject to proper safeguards, of delay."

The House of Lords, the conservative majority in which was represented by Lord Lansdowne, leader of the opposition, accepted the challenge, and immediately set to work to commence a reform of its existing constitution with a view to creating a strong and efficient Second Chamber, so as to combat the reactionary forces at work. On March 14 following, Lord Rosebery proposed a measure for the reconstruction of the House, advancing the principle that "the possession of a peerage should no longer of itself give the right to sit and vote in the House of Lords." Accepting this resolution, though reluctantly and with protests from many sides, the

(*z*) *Cf. supra*, p. 549, *n.* (*c*).

House of Lords may be said to have itself signed its death-warrant as an hereditary chamber. Following on this resolution of the House, manifold schemes were at once launched by publicists and others for its reconstitution. Foremost, that of Lord Rosebery, who, on April 13 ensuing, gave notice of a resolution embodying a scheme of reform of that chamber: "(a) That, in future, the House of Lords shall consist of lords of parliament (1) chosen by the whole body of hereditary peers from among themselves and by nomination by the crown, (2) sitting by virtue of offices and of qualifications held by them, (3) chosen from outside: (b) that the term of tenure of all lords of parliament shall be the same, except in the case of those who sit *ex officio*, who would sit so long as they hold the office for which they sit."

Meanwhile the House of Commons was not slow to act upon the mandate of the country. The fact that the government majority was gained by the adherence of the Irish parties, who, anticipating advantage, lent their support to the liberal government in return for a promise of home rule, did not, as the opposition maintained, render the action of the government unconstitutional.

The Parliament Bill introduced.

The Parliament Bill was on April 11 of the same year brought in by the prime minister (Mr. Asquith), who threw down the gauntlet to the lords with the words: "If the lords fail to accept our policy, or decline to consider it when it is formally presented to the House, we shall feel it our duty immediately to tender advice to the crown as to the steps which will have to be taken if that policy is to receive statutory effect in this parliament . . . if we do not find ourselves in a position to ensure that statutory effect will be given to this policy in this parliament, we shall then either resign our offices or recommend a dissolution of parliament" (*a*).

In the midst of this acrimonious political strife, King Edward VII. died, and his son, King George V., ascended the throne. In the first few years of the latter's reign, as we shall see, many constitutional changes of the greatest importance were effected.

(*a*) See Hansard, Parl. Debates, April 1910.

The Conference.

Probably in order that the new reign should commence under calmer conditions, the government and the unionist opposition called a truce; and in a mutual and conciliatory manner endeavoured, in a private conference (*b*), to find a *modus vivendi* touching the vexed question of the relations between the two Houses of Parliament. This conference, conducted with good feeling on both sides, failed after a final sitting in November 1910. A "state of war" ensued. In both Houses animated debates took place, and, Lord Rosebery having withdrawn his resolution as to a reconstitution of the Upper House, Lord Lansdowne moved the second reading of the Parliament Bill, attaching certain resolutions defining the attitude of the House of Lords, whenever sharp conflict of opinion should arise between the two Houses. These resolutions, while admitting the necessity of a reconstitution of the House of Lords on the lines already accepted under Lord Rosebery's motion, introduced two further proposals for the settlement of disputes, both alike alien to the spirit and tradition of the constitution. These were: submission of acute controversial differences to the electors for decision by referendum (*c*); or to a joint committee of both Houses, with the Speaker of the House of Commons as chairman (*d*). The referendum has many advocates on the conservative-unionist side, as also among the advanced socialist wing of the radical party,

(*b*) The members of the Conference were Mr. Asquith (Prime Minister), Mr. Lloyd George (Chancellor of the Exchequer), Mr. Birrell (Secretary for Ireland), and the Earl of Crewe (Colonial Secretary), on the part of the Government; Mr. Balfour, Mr. A. Chamberlain, Lord Lansdowne, and Lord Cawdor, on the part of the Opposition.

(*c*) A referendum, or plebiscite, is a popular vote on legal proposals which have been already considered by parliament. A like system was foreshadowed by Rousseau in "Le Contrat Social," and, though attempted in France, in 1793, was not put into practice in Europe until 1874—in Switzerland—where its working has been fairly successful. It has also been tried with no great results in the United States and in Belgium, and is embodied in the constitution of the Australian Commonwealth. *Cf.* Professor Dicey, in the *Contemporary Review*, April 1890; E. P. Oberholzer, The Referendum in America (1893); Democracy in Switzerland in *Edinburgh Review*, January 1890; and the article by W. B. Coolidge, in Ency. Brit., 11th ed., sub. "Switzerland."

(*d*) A joint committee of both Houses of the legislature is provided under the constitution in most of the self-governing British colonies, as also of the federated states of which they are composed, notably in the Cape parliament and various Australian colonies.

but fails to find favour among the liberal party as a whole, where support of a popular vote might have been expected.

Liberal government reinstated, Nov. 1910.

The parliament elected in January 1910 having been dissolved in November of that year, the liberals went to the country on the same issue on which they were returned to power eleven months previously—namely, the Parliament or Veto Bill. The unionists, in their campaign, while resisting the latter, placed in the forefront of their programme tariff reform and the referendum with especial applicability to the former. While the polling was yet in progress, the prime minister (Mr. Asquith) declared it to be the intention of the liberal party, if returned to power, to grant Ireland a certain measure of home rule. This question not having been placed before the electorate at the commencement of the electoral campaign as part of the government programme, the issue was somewhat obscured.

The result of the election was to reinstate the liberals in power, with the strength of the parties (or groups) in parliament practically unchanged (*e*).

The "guarantees."

On the new parliament assembling in January, 1911, the government at once indicated their line of action—the Parliament Bill to be passed at all hazards. The speech from the throne showed that the sovereign had given his assent to the guarantees demanded by his advisers in the cabinet—an exercise of the royal prerogative, should it become necessary, in creating a sufficient number of peers to carry the measure through the House of Lords. The Parliament Bill was once more passed through the House of Commons, and was sent up to the lords in its substantial form. Around it raged one of the most memorable conflicts known to English political history. The lords' amendments were rejected. At last, the bill passed the House of Lords on August 10, 1911, owing to abstentions on the part of members rallying to Lord Lansdowne, who, in view of the momentous issues involved, and to save the

(*e*)

Strength of Parties.	Unionists.	Liberals.	Labour.	Nat.	
January 1910	273	275	40	82	670
December 1910	272	272	42	84	670

sovereign from exercising his royal prerogative—a duty which was known to be distasteful to him—counselled this course as being the most loyal. The announcement of Lord Morley, the leader of the government in the House of Lords, in the course of the final debate (August 10) made the situation clear: "If the bill should be defeated to-night, His Majesty would assent to a creation of peers sufficient in number to guard against any possible combination of the different parties in opposition, by which the Parliament Bill might again be exposed a second time to defeat" (*f*). A faction led by the Earl of Halsbury—one containing among its members some of the most illustrious names in contemporaneous history—insisted upon opposition to the bill, *i.e.* in their persistence in the lords' amendments. By a majority of seventeen the Parliament Bill passed (*g*), without the exercise of the royal prerogative being invoked.

PARLIAMENT ACT (1911).

(1 & 2 Geo. V. c. 13.)

An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament. [18th August, 1911.]

Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:

And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal,

(*f*) Parl. Debates, House of Lords, August 10, col. 999.

(*g*) In the voting on non-insistence on the amendments to the Parliament Bill, the numbers were: For, 131; against, 114; majority, 17.

and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Powers of House of Lords as to money bills.

1.—(1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

(2) A Money Bill means a public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to these subjects or any of them. In this sub-section the expressions "taxation," "public money," and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.

(3) There shall be indorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate, the Speaker shall consult, if practicable, two members to be appointed from the Chairmen's Panel at the beginning of each Session by the Committee of Selection.

Restriction of the powers of the House of Lords as to bills other than money bills.

2.—(1) If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.

(2) When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the certificate of the Speaker of the House of Commons signed

by him that the provisions of this section have been duly complied with.

(3) A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent any amendments which have been made by the House of Lords in the former Bill in the preceding session and any amendments which are certified by the Speaker to have been made by the House of Lords in the third session and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section:

Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second or third session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords.

3. Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

4.—(1) In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say:

> "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows."

(2) Any alteration of a Bill necessary to give effect to this section shall not be deemed to be an amendment of the Bill.

Provisional Order Bills excluded.

5. In this Act the expression "Public Bill" does not include any Bill for confirming a Provisional Order.

Saving for existing rights and privileges of the House of Commons.

6. Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons.

Duration of Parliament.

7. Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715.

8. This Act may be cited as the Parliament Act, 1911 (*h*).

(*h*) The Parliament and Registration Act, 1916 (5 & 6 Geo. 5, c. 100), is an amendment of the Parliament Act, 1911, in connection with the existing parliament, and suspended the machinery for the registration of electors.

With this political crisis at an end, it remains to sum up the constitutional points involved and to endeavour to form a view as to the outlook for the future. Results.

The rise of socialism to power is an established fact. It is due to its sturdy insistence that this victory was won first at the polls and then, through the king's advisers, at the doors of the hereditary chamber. The attitude of the Halsbury party, had it been successful, would not have averted, but only temporarily have checked, the inevitable flow of the democratic tide, which would most probably have soon burst through the barriers in a torrent.

To the student of English constitutional history, the crisis of 1911 presents an event fraught with far-reaching consequences. It cannot be reasonably hoped that the reversal of the vote, once given, should it, as has been suggested, be ever attempted, would restore the old *régime* and allow the ancient constitution to continue its course in the time-honoured groove. A reconstitution of the House of Lords, as a second and revisionary chamber, seemed inevitable in the near future. The ways and means and modes thereto, and the probable extent of its powers, when reconstituted, eluded the ken of the observer at the moment.

This much may, at present, be fairly advanced. The vote given in the House of Lords enables that body still to co-operate as a limb of the constitution, to all outward appearances, in the same way as of old, saving the restriction of its powers under section 2 of the Parliament Act. But this very circumscription of its powers reduces it practically to impotence in the face of an overwhelming vote in the commons (*i*). The crown has also suffered—less in prestige than in influence. There is no doubt that, while not exceeding their official duty in tendering advice to the sovereign, his ministers forced from the fountain of the royal prerogative concessions which the king was loth to give, and were thus morally responsible for an attack upon

(*i*) "It is now clearly demonstrated that the old division of powers between King, Lords, and Commons is at an end. The power of the King has passed to his Cabinet; the power of the Lords has disappeared; the power of the Commons is represented by the will of the predominant party . . . as expressed by the Cabinet." *The Times*, August 15, 1911, a letter entitled "An Appeal for Constitutional Reform."

the crown itself. The result has been to weaken the political position of the king—a result that his responsible advisers probably never contemplated.

Reform of House of Lords.

After the powers of the House of Lords had been limited by the Parliament Act, 1911, the government did not abandon the opinion, which was everywhere gaining ground, that the reform of the constitution of the Upper House should be effected with as little delay as possible. The outbreak of the Great War in August 1914 further postponed the consideration of the question; and it was not till August 25, 1917, that the prime minister appointed a committee (under the presidency of Lord Bryce) to inquire into the subject. The terms of reference were:—

"To inquire and report—

(i) As to the nature and limitations of the legislative powers to be exercised by a reformed Second Chamber.

(ii) As to the best mode of adjusting differences between the two Houses of Parliament.

(iii) As to the changes which are desirable in order that the Second Chamber may in future be so constituted as to exercise fairly the functions appropriate to a Second Chamber."

Report of Committee of Inquiry.

The conference, which began on October 2, 1917, held forty-eight sittings, and extended over more than six months. Its report was issued in April 1918 (*k*). That the task imposed on it was beset with difficulties is obvious. As the chairman remarks in his covering letter: "We had to adapt an ancient institution to new needs, fitting it in to a system which presents new conditions, and seeking to overcome prejudices and antagonisms which generations of party conflict had made acute. In particular we have been obliged to undertake the grave task of finding a basis for any Second Chamber which should be different in type and composition from the popular assembly, by including other elements which might be complementary to those which give its character to the House of Commons. Not less difficult was it to adjust the respective functions and powers

(*k*) See Parl. Papers (1918), Cd. 9038: Conference on the Reform of the Second Chamber.

of the two Chambers, vesting in the Second Chamber strength sufficient to enable it to act as a moderating influence in the conduct of national affairs, and yet not so much power of delay as to clog the machinery of government, or dispose that Chamber to embark on controversies for the sake of asserting its own power" (*l*).

Functions of a Second Chamber.

As to the functions appropriate to a Second Chamber, the conference agreed on the following points:-

"(1) The examination and revision of bills brought from the House of Commons, a function which has become more needed since, on many occasions, during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

"(2) The initiation of bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

"(3) The interposition of so much delay (and no more) in the passing of a bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards bills which affect the fundamentals of the constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

"(4) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an assembly where debates and divisions do not involve the fate of the executive government" (*m*).

As to the elements that ought to find a place in the Second Chamber, it was agreed that persons of experience in various forms of public work, those who possess special knowledge of important departments of the national life

(*l*) *Ibid.* p. 3.
(*m*) *Ibid.* p. 4.

and of imperial questions, and persons who are not extreme partisans, would be desirable members (*n*).

Concerning the position which the Second Chamber ought to hold in our constitutional system, the following conclusions are submitted: "It was agreed that a Second Chamber ought not to have equal powers with the House of Commons, nor aim at becoming a rival of that assembly. In particular, it should not have the power of making or unmaking ministries, or enjoy equal rights in dealing with finance. . . . All precautions that could be taken ought to be taken to secure that in a reformed Second Chamber no one set of political opinions should be likely to have a marked and permanent predominance, and that the Chamber should be so composed as not to incur the charge of habitually acting under the influence of party motives.

"The Second Chamber should aim at ascertaining the mind and views of the nation as a whole, and should recognise its full responsibility to the people, not setting itself to oppose the people's will, but only to comprehend and give effect to that will when adequately expressed.

It should possess that moral authority which an assembly derives not only from the fact that its members have been specially chosen to discharge important public duties but also from their personal eminence, from their acknowledged capacity to serve the nation, and from the confidence which their characters and careers are fitted to inspire. . . . So far as is possible a continuity should be preserved between the ancient House of Lords and the new Second Chamber, the best traditions of the former being handed on to the new body, so as to enhance its dignity, and make a seat in it an object of legitimate ambition. . . ." (*o*).

Composition of the Second Chamber.

The above fundamental principles secured the unanimous agreement of the conference, as they will no doubt command general assent. But the question of the composition of the Second Chamber was found to be placed on more difficult and debatable ground. The desiderata dictated by the preliminary considerations were first that a certain portion of the new body should be taken from the existing peerage, and secondly that the large majority of the mem-

(*n*) *Ibid.* pp. 4, 5.

(*o*) *Ibid.* p. 5.

bers should be so chosen as to enjoy popular authority. The idea of an election on the basis of a property qualification—either for electors or elected was rejected; as also was the proposal to take the persons chosen from certain prescribed categories. In order to make the popular element predominant, five alternative methods of composition were examined: (a) nomination, (b) direct election, (c) election by local authorities, (d) selection by a joint standing committee of both Houses, (e) election by the House of Commons (*p*). The method recommended is that the Second Chamber should consist of two sections: (a) 246 persons elected by panels of members of the House of Commons distributed in certain territorial areas, the period of tenure to be twelve years (one-third to retire every four years); (b) eighty-one persons elected by a certain joint standing committee of both Houses, tenure and retirement as in the preceding section (*q*). Further, the lord chancellor, ex-lord chancellors, and the law lords appointed under the Appellate Jurisdiction Acts are to be members *ex officio* if the new Second Chamber is to discharge the judicial functions hitherto discharged by the House of Lords (*r*).

The remainder of the report contains general recommendations, recommendations relating to the first constitution of the new Chamber, and deals with the powers in respect of financial bills and the adjustment of differences between the two Houses (*rr*).

The Irish question.

Of the various legislative enactments dealing with Ireland between the years 1816-1842, no fewer than thirty-two were in favour of the landlord, whilst legislation entirely neglected the tenant. The first step towards improving the position of the latter was taken in 1870. The Act of 1870 brought about a great revolution in the Irish tenants' cause, and that of 1881 gave them the right to transfer or sell to another their right of tenure, to demand that a corresponding rent should be fixed, and that the lease or tenure should be renewed for a definite period;

(*p*) *Ibid.* pp. 6-9.
(*q*) *Ibid.* p. 11.
(*r*) *Ibid.* p. 12.
(*rr*) *Ibid.* pp. 12 *seq.*

further concessions in this direction were proposed by the Gladstonian government, but did not become law.

Home Rule proposed.

In 1886 Mr. Gladstone brought in his first Home Rule bill, which brought about a schism in the liberal party; it was defeated at its second reading by 343 against 313, among the former being ninety-three liberals. But agitation for Home Rule was vigorously maintained, and at the general election in 1892 a majority were returned in its favour. In February 1893 Mr. Gladstone brought in his second Home Rule bill, known as the Government of Ireland bill, the main terms of which were that an Irish parliament, consisting of two Houses sitting in Dublin and an Irish ministry (to wit, an executive committee of the Privy Council in Ireland), should be formed. Through these organs, which were, moreover, to be deprived of the conduct of naval, military, and foreign affairs, the government of Ireland was to be separately carried on; the Irish members to remain members of the imperial parliament, but without the right of deliberating and voting upon matters which exclusively concerned Great Britain. Violent debates were held around this bill. It finally passed the third reading in the House of Commons on September 1, 1893, by a majority of thirty-four; but on September 9 following it was rejected by the House of Lords by 419 votes to forty-one votes. The prime minister, Mr. Gladstone, refused on this vote to dissolve parliament. He resigned, and was succeeded by Lord Rosebery. Reform projects and motions of the wildest character filled up the time of the House of Commons until late in 1894. Eventually, the government had to abandon its comprehensive reform programme, including the Welsh Church Disestablishment bill. At last the Irish Tenants Relief bill was rejected by the House of Lords by an overwhelming majority, and the government resigned.

For the next ten years (1895-1905) the tory party were in power, and the Home Rule policy was thus postponed. In 1905 the unionist government resigned without dissolving parliament, and Sir Henry Campbell-Bannerman, a Home Ruler, became prime minister. However, in order to conciliate a number of liberals, he promised that if a

liberal majority were returned at the polls a Home Rule bill would not be brought forward; the result was that only 135 unionists were returned out of 670 members. On March 30, 1908, he submitted the following motion: "That the reform of Irish government is a matter vital to the interests of Ireland, and calculated greatly to promote the well-being of the people of Great Britain, and in the opinion of this House the solution of the problem can only be obtained by giving to the Irish people the legislative and executive control of their own affairs." It was carried by 334 against 142. But owing to the lords' rejection of the budget parliament dissolved; and the following parliament was itself dissolved in November 1910, because of the failure of the conference of liberal and conservative leaders in regard to the question of reforming the House of Lords. The powers of the latter having been restricted by the Parliament Act, 1911, the Home Rule bill was introduced into the commons in 1912; it passed all its stages, but was rejected by the lords. The same thing happened in 1913. In 1914 the bill was sent to the lords for the third time, and would have become law, conformably to the Parliament Act, in spite of its rejection by the lords. In the meantime, various incidents occurred in Ulster; whereupon the cabinet proposed an amending bill, giving every county in Ulster liberty to vote itself out of the provisions of the Home Rule bill for a period of three, afterwards extended to six, years. The Irish party were prepared to accept this amending bill on condition that it should be taken as a final settlement. The bill, however, was read only once, owing to the outbreak of the Great War. On September 15, 1914, Mr. Asquith introduced a bill to delay the operation of the Home Rule and the Welsh Disestablishment bills for one year or for the period of the war; and on September 18 the Home Rule bill received the royal assent (the Suspensory Act bearing the same date).

Home Rule bill passes the commons, but rejected by the lords.

Amending bill.

Home Rule bill passed.

Subsequently serious disturbances and rebellion broke out in Ireland (April 1916), and it was generally felt that time and altered circumstances rendered necessary modifications of the Home Rule Act of 1914. Mr. Asquith, referring in the House of Commons to the breakdown of the existing machinery of the Irish Government, and to the supreme

Modifications found necessary.

importance of preserving the unity of the Government "in this great crisis of our history," intimated that an effort would be made to secure an agreement between the Irish parties as to the future government of Ireland. This effort afterwards failed. On July 10, 1916, Mr. Asquith said the cabinet were prepared to submit proposals to the House in the form of a new bill, providing for a Home Rule government to be set up in Dublin, the exclusion therefrom of the six north-east counties of Ulster and the three parliamentary boroughs of Belfast, Londonderry, and Newry. The Irish House of Commons would consist of the existing Irish members of parliament, who would continue to vote in the British parliament; and all that pertained to the war and to the defence of the realm would remain under the exclusive control of the Imperial Government and parliament. The arrangement would hold good for twelve months after the war; and if by that time a permanent provision had not been made for the government of Ireland, the period could be extended by Order in Council.

New proposal, 1916.

The Government having been reconstituted, the new prime minister, Mr. Lloyd George, said in the House of Commons (March 7, 1917) that the government were still prepared to extend self-government to that part of Ireland which asked for it, but only to that part. The appointment of a commission of inquiry was suggested. It was felt in the House that there was already general agreement on three points: suitable self-government for the greater part of Ireland, no compulsion for the other part, and some mark of a visible unity of Ireland. In June it was announced that an Irish Convention would be summoned in Ireland, which could submit to the British parliament a constitution for the future government of Ireland within the empire; and that if a substantial agreement were reached, facilities would be given to enable it to receive legislative effect. Eventually the Irish Convention issued the result of its deliberations. The majority report favoured the establishment of an Irish parliament and executive, possessing full powers over internal legislation, administration, and direct taxation; and agreed that representation in the Imperial Parliament, as well as contribution to imperial service, and the supreme authority of the

Irish Convention.

Imperial Parliament should be retained. As the Convention failed to secure a settlement by consent, the Government undertook to introduce a new Home Rule bill.

Disestablishment of the church in Wales.

On April 21, 1909, Mr. Asquith, the prime minister, brought in the Welsh Disestablishment bill. "After mentioning that he had introduced a measure on the same lines just fourteen years before, he said that the Welsh Church had existed before that of England, that it had been incorporated into the Church of England and denationalised by the appointment, from Henry II. till within living memory, of Englishmen to its bishoprics, deaneries, and even parochial benefices; and that Welsh nonconformity was not the product of puritanism, but of an eighteenth-century revolt within the church, which was out of touch with the mass of Welshmen. The initiators of this movement were driven out of the church. . . . The case was much stronger than that against the Irish Church, which had been disestablished" (*s*). The object of the bill was to dissolve all ecclesiastical corporations, and to exclude the Welsh bishops from the House of Lords; the rules of the Church of England would apply to Wales only by agreement; synods and conventions could be held and a representative body could be established for dealing with the doctrines and property of the disestablished church; and detailed provisions were made for effecting disendowment. The bill, however, failed. Another bill was introduced on March 5, 1914, and again met with much opposition; objectors held that it violated every sound principle of dealing with corporate property, that it amounted to manifest robbery, etc. Eventually the bill was passed (May 19), received the royal assent (September 18), and became law under the provisions of the Parliament Act, 1911. Owing to the war, its operation was suspended by the Suspensory Act, 1914, until such date not later than the end of the war as may be fixed by Order in Council (*t*).

(*s*) Annual Register, 1909, p. 84.

(*t*) For a convenient analysis of the Welsh Church Act, 1914 (4 & 5 Geo. 5. c. 91), see Ridges, Const. Law (2nd ed. 1915), pp. 334 *seq.*

Franchise and electoral reform.

Since the passing of the Representation of the People Act, 1884, and the Redistribution of Seats Act, 1885, there have been increasing demands for further franchise and electoral reforms—the most important of which being the enfranchisement of women. It was reserved for the year 1918, when Great Britain was engaged in the greatest war in her history, to introduce changes of the greatest magnitude; and the successful accomplishment of this task was largely facilitated by the fact that party conflicts were necessarily in abeyance and party lines were blurred under the régime of a coalition government. Already in August 1916 the prime minister (Mr. Asquith), in view of the existing party truce, suggested that an agreement should be arrived at for securing a scheme whereby the electorate and the distribution of electoral power should be so modified that a parliament might be brought into existence by the end of the war capable of and adequate for carrying out the work of reconstruction. The proposal was supported, and eventually it was agreed to set up a conference, presided over by the Speaker. Thirty members of both Houses, representing the various shades of political opinion in parliament and in the country at large, were selected, and after some months of deliberation they proposed a scheme of reform, which was afterwards almost entirely accepted by the legislature and embodied in the Representation of the People Act, 1918 (8 Geo. 5. c. 64).

The new Reform Act, 1918.

This new Reform Act—the result of a noteworthy compromise—has been acclaimed as one of the most successful enactments ever passed. The changes it introduced were conspicuous as much for their drastic character as for their significance. By the great Act of 1832 (*u*) many seats were surrendered and redistributed, but the number of members remained unchanged at 658; franchise modifications were made whereby some 455,000 persons received the vote. The Act of 1867 (*w*) made further changes, disfranchising a number of boroughs and redistributing the seats, but leaving the total number of members in the House of Commons the same as before; secondly, household suffrage was established in the boroughs, together with a lodger

(*u*) See *supra*, p. 722. (*w*) *Supra*, p. 723.

franchise of £10, and in the counties £12 occupation was made the basis—thus about 1,080,000 voters (most of whom were manual workers in the towns) were added to the register; thirdly, a plan for the protection of minorities was adopted. The Act of 1885 brought a further 2,000,000 electors (of whom the majority were agricultural labourers), it did much to establish equality in regard to electoral areas, and increased the number of members from 658 to 670. The Act of 1918 adds about 8,000,000 electors to the register, for the first time extends the franchise to women (thus making the number of the electorate about 16,000,000), and applies the principle of proportional representation (*x*) to university elections when there are two or more candidates (*y*). (A commission is to be appointed to apply it also to a hundred constituencies, subject to the acceptance of its report by both Houses.) The main subjects of the new enactment are the qualification of electors, the registration of electors, the method and cost of elections, and the redistribution of seats.

Qualification of electors.

With regard to the franchise, the Act is far wider in its scope than any of its predecessors and effects a substantial change. Instead of the seven alternative qualifications, there are henceforth to be three (*z*), namely, in respect of (a) residence, (b) occupation of business premises, (c) the possession of a university degree (or, in the case of women, its equivalent). The ownership qualification is abolished, and plural voting along with it, save in a very limited form. In future no man may have more than two votes at a general election, one by reason of his residence, and a second either for the constituency in which he carries on his business or for his university (*a*). The qualifying period is reduced to six months (*b*), so that the register will have to be drawn up twice a year, half the expenses being paid by the state, half out of the local rates (*c*).

Women.

As has been pointed out, the most remarkable innovation is the extension of the franchise to women; but the basis of their qualification is different from that of men. A woman

(*x*) See *supra*, p. 724.
(*y*) Sect. 20 (1).
(*z*) Sect. 20 (2).
(*a*) Sect. 8.
(*b*) Sect. 6.
(*c*) Sect. 15 (4).

is entitled to vote if she has attained the age of thirty, and is not subject to any legal incapacity, and is qualified as a local government elector—that is, if she is a ratepayer or the occupant of unfurnished lodgings, or is the wife of a man so qualified; also in respect of a university qualification (*d*).

Disqualifications.

The former disqualification on the ground of receipt of poor relief is removed; but another—due to the circumstances of the war—is imposed on a certain section of "conscientious objectors" to military service (*e*). The old disqualifications through legal incapacity remain—that is those applying to peers, infants, aliens, felons, convicts, idiots, lunatics, persons found guilty of corrupt and illegal practices, and persons disqualified for non-payment of rates. But the incapacity of peers does not extend to peeresses in their own right (*f*).

Registration.

There are to be two registers: a spring register, containing the names of those who have qualified up to January 15, coming into force on April 15 and remaining in force until October 15; and an autumn register, containing the names of those who have qualified up to July 15, coming into force on October 15 and remaining in force until April 15. If a fresh spring or autumn register is not prepared in time, the register in force at the time is to apply (*g*). There are detailed provisions in regard to registration areas, the functions of registration officers, notices of objection, the publication and custody of the register, expenses of registration, &c. (*h*).

Redistribution of seats.

A redistribution of seats is effected, chiefly on the ground of population, the unit being one seat for every 70,000 inhabitants, though in exceptional cases the commissioners were empowered to depart from this standard of division. Great Britain thus gets 602 members instead of 557, whilst the total number is increased from 670 to 707. The Scottish universities are to return three members each, those of London and Wales one each, all the others (including Oxford and Cambridge) two each (*i*). In the case of

(*d*) Sect. 4.
(*e*) Sect. 9 (2).
(*f*) Sect. 9.
(*g*) Sect. 11.
(*h*) Sects. 12-15.
(*i*) Sect. 37 and Ninth Schedule.

Ireland, redistribution is effected by a separate Act (*k*), the standard unit of population is 43,000, and the number of members is increased from 103 to 105.

Commencement of Act.

The Act came into operation on its passing; but this is not to affect any parliamentary register for the time being in force, or any parliamentary elections, or the constitution of the House of Commons, until parliament is first dissolved after the first register to be prepared under the Act comes into force. The date on which the first register shall come into force, and the date until which it shall remain in force, may be fixed or altered by Order in Council (*l*).

(*k*) The Redistribution of Seats (Ireland) Act, 1918 (7 & 8 Geo. 5, c. 65).
(*l*) Sect. 46.

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